Michael Hardwick, et al., Plaintiffs-appellants, v. Michael Bowers, et al., Defendants-appellees, 760 F.2d 1202 (11th Cir. 1985)

U.S. Court of Appeals for the Eleventh Circuit - 760 F.2d 1202 (11th Cir. 1985)

May 21, 1985

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Nan D. Hunter, New York City, for ACLU.

Appeal from the United States District Court for the Northern District of Georgia.

Before KRAVITCH and JOHNSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

JOHNSON, Circuit Judge:

The Atlanta Police arrested Michael Hardwick on August 3, 1982, because he had committed the crime of sodomy with a consenting male adult in the bedroom of his own home. Charges were brought as a result of the arrest and after a hearing in the Municipal Court of Atlanta Hardwick was bound over to the Superior Court. At that point the District Attorney's office decided not to present the case to the grand jury unless further evidence developed.

Hardwick then filed this suit asking the federal district court to declare unconstitutional the Georgia statute that criminalizes sodomy, O.C.G.A. Sec. 16-6-2 (1984).[1] Hardwick alleged in his complaint that he is a practicing homosexual who regularly engages in private homosexual acts and will do so in the future. He was joined in bringing the suit by John and Mary Doe, a married couple acquainted with Hardwick. They claimed that they desired to engage in sexual activity proscribed by the statute but had been "chilled and deterred" by the existence of the statute and the recent arrest of Hardwick.

The complaint named as defendants Michael Bowers, Attorney General of Georgia; Lewis Slaton, District Attorney for Fulton County; and George Napper, Public Safety Commissioner of Atlanta. All three filed a motion to dismiss for failure to state a claim upon which relief could be granted.

The district court granted the motion. It ruled that the Does did not have standing to bring suit and that Hardwick, although he possessed standing, had no legal claim in light of the Supreme Court's summary affirmance of a three-judge district court in Doe v. Commonwealth's Attorney for the City of Richmond, 425 U.S. 901, 96 S. Ct. 1489, 47 L. Ed. 2d 751 (1976), aff'g, 403 F. Supp. 1199 (E.D. Va. 1975). All three plaintiffs have appealed the dismissal.

A federal court may not hear a legal claim unless it arises from a genuine case or controversy. A case or controversy requires a plaintiff with a personal stake in the outcome sufficient to assure an adversarial presentation of the case. Hence, a plaintiff must demonstrate that he or she has suffered an actual or threatened injury caused by the challenged conduct of the defendant. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 102 S. Ct. 752, 70 L. Ed. 2d 700

(1982); American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce, Inc., 698 F.2d 1098 (11th Cir. 1983).[2]

The State is not currently prosecuting Hardwick or the Does under the sodomy statute. The Does have never been arrested under the statute and Hardwick cannot rely solely on his past arrest to confer upon him standing to challenge the constitutionality of the statute. City of Los Angeles v. Lyons, 461 U.S. 95, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983); Golden v. Zwickler, 394 U.S. 103, 89 S. Ct. 956, 22 L. Ed. 2d 113 (1969). This suit, therefore, presents an anticipatory challenge to the statute. The standing of each of the plaintiffs will depend on whether the threat of prosecution under this statute is real and immediate or "imaginary" and "speculative." Steffel v. Thompson, 415 U.S. 452, 459, 94 S. Ct. 1209, 1215, 39 L. Ed. 2d 505 (1974).

A court can estimate the likelihood of prosecution by examining the identity and interests of each of the parties. The interest of the State in enforcing the statute, along with past enforcement patterns, provides one indication; the interest of the plaintiff in engaging in the prohibited activity provides another. International Society for Krishna Consciousness v. Eaves, 601 F.2d 809, 818 (5th Cir. 1979).[3]

The interest of the State in prosecuting these plaintiffs need not take the form of a specific threat of prosecution against them individually, although such a threat will often suffice to give a plaintiff standing. Steffel v. Thompson, supra. A general threat of prosecution against an identifiable group may confer standing in some instances. For instance, in Lake Carriers' Association v. MacMullan, 406 U.S. 498, 508, 92 S. Ct. 1749, 1756, 32 L. Ed. 2d 257 (1972), the Court ruled that a group of bulk cargo vessel owners had standing to challenge a state law, about to go into effect, mandating certain sewage disposal methods for cargo vessels. Even though the State had threatened no particular owner with prosecution under the statute, it announced that it would prosecute violators as soon as the statute became effective.

The past enforcement of the statute against Hardwick is especially significant in measuring the State's intentions of prosecuting him in the future. Hardwick alleges that his arrest resulted from a situation in which he regularly places himself, one that will recur often in the future. As this Court recognized in Cuidadanos Unidos de San Juan v. Hidalgo County Grand Jury Commissioners, 622 F.2d 807, 820 (5th Cir. 1980), cert. denied, 450 U.S. 964, 101 S. Ct. 1479, 67 L. Ed. 2d 613 (1981), evidence of past injuries inflicted by the State raises the strong inference that future injuries will appear. A past enforcement effort often will confirm the reasonableness of a plaintiff's subjective fear of prosecution. This is particularly true in Hardwick's case if one accepts as true[4] his allegation that the Atlanta

Police enforce the statute in a way that places all practicing homosexuals in imminent danger of arrest.

A second indicator of threatened harm to these plaintiffs comes from the nature of their interest in violating the statute. Each of them claims that their normal course of activity will lead them to violate the statute, completely apart from their desire to have it invalidated. Hardwick's status as a homosexual adds special credence to his claim. See International Society for Krishna Consciousness v. Eaves, supra, at 819. While a plaintiff hoping only to challenge a statute might overestimate his or her willingness to risk actual prosecution, a plaintiff who genuinely desires to engage in conduct regardless of its legal status presents a court with a more plausible threat of future prosecution.

In some cases, the authentic interest of the plaintiff in engaging in the prohibited conduct can establish standing even though the only threat of enforcement by the State comes from the very existence of the statute. The Supreme Court in Babbitt v. United Farm Workers National Union, 442 U.S. 289, 302-03, 99 S. Ct. 2301, 2310-11, 60 L. Ed. 2d 895 (1979), held that a union could challenge a state law prohibiting deceptive advertising relating to farm products because the union planned to sponsor advertising campaigns in the future and the State had not disavowed any intention of enforcing the statute. The risk that the State would detect the inadvertent use of an inaccuracy in an advertisement by the union and would prosecute for that offense was a threat immediate enough to give the union standing. See also Doe v. Bolton, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973) (doctor who consulted with pregnant women regarding birth control in violation of law was "one of those against whom these criminal statutes directly operate"); Epperson v. Arkansas, 393 U.S. 97, 89 S. Ct. 266, 21 L. Ed. 2d 228 (1968) (teacher challenging statute prohibiting teaching of evolution). A plaintiff has a stronger claim for standing if, in addition to the authenticity of the interest, he or she is best suited to challenge a law. Atlanta Gas Light Company v. United States Department of Energy, 666 F.2d 1359, 1364 n. 7 (11th Cir.), cert. denied, 459 U.S. 836, 103 S. Ct. 81, 74 L. Ed. 2d 78 (1982).

The past arrest of Hardwick, combined with the continuing resolve on the part of the State to enforce the sodomy statute against homosexuals and the authenticity of Hardwick's desire to engage in the proscribed activity in the future, leads us to agree with the district court that Hardwick has standing to bring this lawsuit. The issue of the Does' standing is less straightforward. They have not been arrested or threatened with arrest for sodomy. At first glance, they appear to be in the same position as several of the plaintiffs in Younger v. Harris, 401 U.S. 37, 40-42, 91 S. Ct. 746, 748-749, 27 L. Ed. 2d 669 (1971), who intervened in a federal suit filed by an acquaintance who had been prosecuted by the state under a

criminal syndicalism law. The intervenors, teachers, alleged that the existence of the statute and the prosecution of Harris had "inhibited" their teaching and had left them "uncertain" as to their legal rights. The Court ruled that the intervenors had no standing.

The Does argue that they do not stand in precisely the same position as the intervenors in Younger because the defendants in that case brought their appeal after the entry of final judgment in the three-judge district court. The intervenors had been given an opportunity to present evidence of a realistic probability of prosecution apart from their unsupported fears; they had presented no such evidence. The Does, on the other hand, have not had an opportunity to engage in discovery and to present evidence relating to the enforcement of this statute against married couples.

The lack of evidence related to threat of injury should in many cases lead a court to permit discovery and to make factual findings before dismissing a suit for lack of standing. Cf. Chancery Clerk of Chickasaw County, Mississippi v. Wallace, 646 F.2d 151, 159 (5th Cir. Unit A 1981); City of Waco v. Environmental Protection Agency, 620 F.2d 84 (5th Cir. 1980). The Does, however, did not allege in their complaint that they faced a serious risk of prosecution. They stated only that the existence of the statute along with the arrest of Hardwick had "chilled and deterred" them and had "interfered" with decisions regarding their private lives. In resisting the defendants' motion to dismiss for lack of standing, the Does never claimed membership in a group especially likely to be prosecuted. Throughout the proceedings in the district court, including the motion for reconsideration of the judgment, the Does claimed that the existence of the statute, its literal applicability to their situation, and the refusal of the State to disavow any intent to prosecute them combined to give them standing. At no time before this appeal did they request discovery or an evidentiary hearing to determine the likelihood of future prosecution; they filed no affidavit to establish any realistic threat. Under these circumstances, Younger v. Harris, supra, controls and we affirm the district court's dismissal of the Does' complaint for lack of standing. Cf. Poe v. Ullman, 367 U.S. 497, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (1961).

II. THE EFFECT OF DOE V. COMMONWEALTH'S ATTORNEY

In 1975 a three-judge district court in Virginia upheld the constitutionality of that state's sodomy law, Doe v. Commonwealth's Attorney for City of Richmond, 403 F. Supp. 1199 (E.D. Va. 1975). The plaintiffs, homosexuals who had neither been arrested nor threatened with prosecution, argued that the statute violated their rights to due process, freedom of expression, privacy, and freedom from cruel and unusual punishment. They appealed the adverse decision of the district court to the Supreme Court. The Court summarily affirmed the judgment. 425 U.S. 901, 96 S. Ct. 1489, 47 L. Ed. 2d 751 (1976). The district court in

this case dismissed Hardwick's complaint for failure to state a claim upon which relief could be granted, relying exclusively on Doe.

A. The Bounds of the Original Holding in Doe

A summary affirmance of the Supreme Court has binding precedential effect. Hicks v. Miranda, 422 U.S. 332, 344, 95 S. Ct. 2281, 2289, 45 L. Ed. 2d 223 (1975). Yet because the Court disposes of the case without explaining its reasons, the holding must be carefully limited. A summary affirmance represents an approval by the Supreme Court of the judgment below but should not be taken as an endorsement of the reasoning of the lower court. Mandel v. Bradley, 432 U.S. 173, 97 S. Ct. 2238, 53 L. Ed. 2d 199 (1977); Fusari v. Steinberg, 419 U.S. 379, 95 S. Ct. 533, 42 L. Ed. 2d 521 (1975).

Despite this general admonition, finding the precise limits of a summary affirmance has proven to be no easy task. Courts seeking to identify the issues governed by a summary affirmance should examine the issues necessarily decided in reaching the result as well as the issues mentioned in the jurisdictional statement. Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 181-83, 99 S. Ct. 983, 988-89, 59 L. Ed. 2d 230 (1979). These two criteria conflict in this case. The jurisdictional statement in Doe presented the question of whether Virginia's sodomy statute violated constitutional rights to privacy, due process, and equal protection under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. Yet the Court could have approved of the result reached by the district court without addressing those constitutional issues because the plaintiffs in Doe plainly lacked standing to sue.[5] Hence, the constitutional issues presented in Doe were issues listed in the jurisdictional statement but not necessary to the disposition of that case.

Several reasons lead us to conclude that the mention of constitutional issues in the jurisdictional statement in Doe does not override the clear availability of a narrower ground of decision. To begin with, the Supreme Court has generally referred to the two indicia, necessity to the decision and presentation in the jurisdictional statement, as if both were necessary. See Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 499, 101 S. Ct. 2882, 2888, 69 L. Ed. 2d 800 (1981) (summary affirmance binding as to "precise issues presented and necessarily decided") (emphasis supplied); Illinois State Board of Elections v. Socialist Workers Party, supra, 440 U.S. at 182-83, 99 S. Ct. at 989-90; Mandel v. Bradley, supra, 432 U.S. at 176, 97 S. Ct. at 2240; see also Cherry v. Steiner, 716 F.2d 687, 690 (9th Cir. 1983), cert. denied, --- U.S. ----, 104 S. Ct. 1719, 80 L. Ed. 2d 190 (1984). Furthermore, if the jurisdictional statement could expand a summary affirmance beyond the scope of issues necessarily decided, it would give the litigants considerable control over the scope of summary dispositions. While a jurisdictional statement prevents speculation

as to what issues the Court actually considered, see Howell v. Jones, 516 F.2d 53, 56 (5th Cir. 1975), cert. denied, 424 U.S. 916, 96 S. Ct. 1116, 47 L. Ed. 2d 321 (1976), it is only a tool in determining the ultimate question: the most narrow plausible rationale for the summary decision.

Lower courts may rely upon the jurisdictional statement as an outside limit on the precential scope of a summary decision but Supreme Court precedent does not allow us to consider the jurisdictional statement as both a minimum and a maximum formulation of the issues decided. Where, as in the Doe case, the facts of the case plainly reveal a basis for the lower court's decision more narrow than the issues listed in the jurisdictional statement, a lower court should presume that the Supreme Court decided the case on that narrow ground. We therefore construe Doe as an affirmance based on the plaintiffs' lack of standing and not controlling in this case.

Even if Doe had been resolved on the constitutional grounds now asserted by Hardwick, [6] the Supreme Court has indicated since that time that the constitutionality of statutes such as the one in question here is not governed by Doe but, rather, remains an open question. Since a summary disposition binds lower courts only until the Supreme Court indicates otherwise, Hicks v. Miranda, 422 U.S. 332, 344-45, 95 S. Ct. 2281, 2289-90, 45 L. Ed. 2d 223 (1975), developments subsequent to the Doe decision undermine whatever controlling weight it once may have possessed.

Doctrinal developments need not take the form of an outright reversal of the earlier case. The Supreme Court may indicate its willingness to reverse or reconsider a prior opinion with such clarity that a lower court may properly refuse to follow what appears to be binding precedent. Indianapolis Airport Authority v. American Airlines, Inc., 733 F.2d 1262 (7th Cir. 1984); Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala.) (three-judge court), aff'd per curiam, 352 U.S. 903, 77 S. Ct. 145, 1 L. Ed. 2d 114 (1956). Even less clear-cut expressions by the Supreme Court can erode an earlier summary disposition because summary actions by the Court do not carry the full precedential weight of a decision announced in a written opinion after consideration of briefs and oral argument. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 500, 101 S. Ct. 2882, 2888, 69 L. Ed. 2d 800 (1981); Edelman v. Jordan, 415 U.S. 651, 671, 94 S. Ct. 1347, 1359, 39 L. Ed. 2d 662 (1974). The Court could suggest that a legal issue once thought to be settled by a summary action should now be treated as an open question, and it could do so without directly mentioning the earlier case. At that point, lower courts could appropriately reach their own conclusions on the merits of the issue. Lecates v. Justice of the Peace Court No. 4 of Delaware, 637 F.2d 898 (3d Cir. 1980).

At least two actions by the Supreme Court demonstrate that it now considers the constitutional issues purportedly determined in Doe to be unsettled. The first indication came in the decision in Carey v. Population Services, 431 U.S. 678, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977). The Court there held, inter alia, that a state could not prevent the sale of non-prescription contraceptives to adults by persons other than licensed pharmacists. Justice Powell stated in a concurring opinion that the majority had employed an unnecessarily broad principle that subjected all state regulation affecting "adult sexual relations" or "personal decisions in matters of sex" to the strictest standard of judicial review. The majority responded in footnote 5 that its holding only applied to state regulation that burdens an individual's right to decide to prevent conception by substantially limiting access to the means of effectuating that decision. It then went on to state the following: "As we observe below, 'the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults,' n. 17, infra, and we do not purport to answer that question now" (brackets in original). Footnote 17, although joined only by a plurality, casts some light on the nature of the "private consensual sexual behavior among adults" referred to in footnote 5 because it cites a law review comment[7] that discusses the possible application of Supreme Court precedent to criminal statutes outlawing private consensual sexual activities, including sodomy. Justice Rehnquist, in a dissenting opinion, criticized the language of footnote 5 because he considered it to be in conflict with Doe, which in his view had definitively established the constitutional validity of state prohibitions of certain consensual activities.

The implications of footnote 5 could hardly be clearer. The plain meaning of the phrase "private consensual sexual behavior among adults" encompasses acts of sodomy carried out between consenting adults in private. The identical phrase in footnote 17 is accompanied by a reference to just that sort of activity. The ability of the state to regulate conduct as Georgia has attempted to do, according to the Court in Carey, is now an open question. Obviously Carey does not provide much guidance as to the proper analysis of the constitutional claims presented in this case; just as obviously, it calls on lower courts to analyze such claims rather than relying on Doe.

A second development in the Supreme Court occurred more recently when the Court granted certiorari in New York v. Uplinger, --- U.S. ----, 104 S. Ct. 64, 78 L. Ed. 2d 80 (1983), and later dismissed the writ as improvidently granted, 104 S. Ct. 2332 (1984). The New York Court of Appeals had ruled in that case that federal constitutional law invalidated a New York statute prohibiting persons from loitering in a public place for the purpose of engaging, or soliciting another person to engage, in "deviate sexual behavior."

The decision was premised on an earlier ruling by that court in People v. Onofre, 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980), cert. denied, 451 U.S. 987, 101 S. Ct. 2323, 68 L. Ed. 2d 845 (1981), where it held that the federal constitution invalidated a state statute criminalizing any act of sodomy between two persons. Hence, the petitioner for writ of certiorari in Uplinger urged the Supreme Court to consider the constitutionality of state regulations prohibiting consensual sodomy among adults.

After the Supreme Court received the briefs of the parties and heard oral argument in Uplinger, it dismissed the writ of certiorari as improvidently granted. In a per curiam order, the Court stated that the case presented an "inappropriate vehicle" for resolving the "important constitutional issues" raised by the parties. The Court also indicated that the constitutionality of state laws against consensual sodomy was one of the most important of those issues; it explained that several impediments to consideration of the constitutional issues presented in the Onofre decision figured heavily in its decision to dismiss the writ. Those impediments included the belated decision of the petitioner not to challenge the Onofre decision and the fact that the state court decision in Uplinger was subject to varying interpretations, leaving uncertainty as to the precise federal constitutional issue the state court decided.

It is fair to conclude from this order that the Supreme Court was prepared to address the constitutionality of state regulations like Georgia's sodomy statute but chose to address the issue when presented more directly in another case.[8] While the Court may have meant that it was prepared to reconsider the Doe affirmance, which would have remained binding precedent until overruled, such a possibility is unlikely because the Court never referred to Doe in the Uplinger proceedings or indicated in any way that the underlying constitutional issue was settled, even temporarily.[9] Under these circumstances, we interpret the order as an indication that the constitutional questions presented by Hardwick are still open for consideration by the Supreme Court and by this Court. This order, together with the Court's observation in Carey, deprives Doe v. Commonwealth's Attorney of whatever controlling weight it once may have had. The district court erred in dismissing Hardwick's claim.

Despite the fact that the district court erred in relying on Doe v. Commonwealth's Attorney, we still confront the question of whether the appellees were entitled to dismissal as a matter of law on some other ground. Smith v. Phillips, 455 U.S. 209, 215 n. 6, 102 S. Ct. 940, 945 n. 6, 71 L. Ed. 2d 78 (1982). In particular, the judgment below could stand if we were to conclude that the statute in question is subject to minimal judicial scrutiny and that the appellants could not under any set of facts prove that the statute is not rationally

related to the State's regulatory interest. See Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02, 2 L. Ed. 2d 80 (1957).

Such is not the case here. The Georgia sodomy statute infringes upon the fundamental constitutional rights of Michael Hardwick. On remand, the State must demonstrate a compelling interest in restricting this right and must show that the sodomy statute is a properly restrained method of safeguarding its interests. Cf. Dike v. School Board of Orange County, Florida, 650 F.2d 783, 787 (5th Cir. Unit B 1981).

The Constitution prevents the States from unduly interfering in certain individual decisions critical to personal autonomy because those decisions are essentially private and beyond the legitimate reach of a civilized society. These include the decision whether to conceive and bear a child, City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 103 S. Ct. 2481, 76 L. Ed. 2d 687 (1983); Bellotti v. Baird, 443 U.S. 622, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979); Carey v. Population Services International, 431 U.S. 678, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977); Roe v. Wade, 410 U.S. 113, 152-53, 93 S. Ct. 705, 726-27, 35 L. Ed. 2d 147 (1973); Skinner v. Oklahoma, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942), and decisions affecting certain intimate relationships such as marriage, Zablocki v. Redhail, 434 U.S. 374, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978); Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967), and other familial ties, Moore v. City of East Cleveland, 431 U.S. 494, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977); Meyer v. Nebraska, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923); Dike v. School Board of Orange County, Florida, 650 F.2d 783 (5th Cir. Unit B 1981).

While the constitutional source of these limitations of the power of the State has been termed the "right to privacy," it is not limited to conduct that takes place strictly in private. Some personal decisions affect an individual's life so keenly that the right to privacy prohibits state interference even though the decisions could have significant public consequences. For instance, the direction of a child's education will have profound public consequences, yet under the Constitution a parent retains authority to direct his or her child's education. Meyer v. Nebraska, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923); Stough v. Crenshaw County Board of Education, 744 F.2d 1479 (11th Cir. 1984). Similarly, a state has an interest in assuring the physical health of its citizens by regulating or forbidding certain medical procedures, but that interest gives way when a woman in the early stages of pregnancy chooses not to have a child. City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 103 S. Ct. 2481, 76 L. Ed. 2d 687 (1983); Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973).

Hardwick desires to engage privately in sexual activity with another consenting adult. Although this behavior is not procreative, it does involve important associational interests. The Supreme Court has indicated in Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), and Eisenstadt v. Baird, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972), that the intimate associations protected by the Constitution are not limited to those with a procreative purpose. The Court in Griswold struck down a state law prohibiting the use of contraceptives because it unduly interfered with the sanctity of the marriage relationship. One component of that relationship is the decision whether to beget and bear children. Carey v. Population Services International, 431 U.S. 678, 685, 97 S. Ct. 2010, 2016, 52 L. Ed. 2d 675 (1977). But the marital relationship is also significant because of the unsurpassed opportunity for mutual support and self-expression that it provides. As the Griswold Court stated, "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes...." 381 U.S. at 486, 85 S. Ct. at 1682. See also Zablocki v. Redhail, 434 U.S. 374, 385-86, 98 S. Ct. 673, 680-81, 54 L. Ed. 2d 618 (1978) (listing "associational interests" and procreation as separate interests protected by right to marry).

The intimate association protected against state interference does not exist in the marriage relationship alone. In Eisenstadt v. Baird, supra, the Supreme Court held that prohibiting the distribution of contraceptives to unmarried persons was unconstitutional because it treated married and unmarried individuals differently. The benefits of marriage can inure to individuals outside the traditional marital relationship. For some, the sexual activity in question here serves the same purpose as the intimacy of marriage.

In addition to the resemblance between Hardwick's conduct and the intimate association of marriage, we pay heed to the fact that he plans to carry out his sexual activity in private. The right to privacy extends to some activities that would not normally merit constitutional protection simply because those activities take on added significance under certain limited circumstances. In particular, the constitutional protection of privacy reaches its height when the state attempts to regulate an activity in the home. Payton v. New York, 445 U.S. 573, 589-90, 100 S. Ct. 1371, 1381-82, 63 L. Ed. 2d 639 (1980).

In Stanley v. Georgia, 394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969), police officers executing a valid search warrant found some obscene films in Stanley's home and he was charged with possession of obscene material. The Supreme Court ruled that a state could not make the private possession of obscene material a crime. Although a state may regulate obscenity when such material is distributed or displayed in public, it may not prohibit strictly private uses of obscenity: "Whatever may be the justifications for other statutes

regulating obscenity, we do not think they reach into the privacy of one's own home.... Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." Stanley's First Amendment interests, while not sufficient to allow the viewing of obscene material in public, prevented the State from deciding what he could view in private. Thus, the element of privacy deepened Stanley's interests and limited the possible purposes of state regulation. See also Moore v. City of East Cleveland, 431 U.S. 494, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977) (plurality) (city may not prohibit family members from living together; Justice Stevens concurs on ground that ordinance directed at internal composition of home lies beyond city's zoning power).

This case presents a person asserting an interest at least as substantial as the one in Stanley v. Georgia. In both cases, the fact that the activity is carried out in seclusion bolsters its significance. This is not a case involving sexual activity with children or with persons who are coerced either through physical force or commercial inducement. The absence of any such public ramifications in this case plays a prominent part in our consideration of Hardwick's legal claim.

In sum, the Supreme Court's analysis of the right to privacy in Griswold v. Connecticut, supra, Eisenstadt v. Baird, supra, and Stanley v. Georgia, supra, leads us to conclude that the Georgia sodomy statute implicates a fundamental right of Michael Hardwick. The activity he hopes to engage in is quintessentially private and lies at the heart of an intimate association beyond the proper reach of state regulation. Such a right is protected by the Ninth Amendment, Griswold v. Connecticut, 381 U.S. 479, 486-94, 85 S. Ct. 1678, 1682-87, 14 L. Ed. 2d 510 (1965) (Goldberg, J., concurring), and the notion of fundamental fairness embodied in the due process clause of the Fourteenth Amendment. Roe v. Wade, 410 U.S. 113, 152-53, 93 S. Ct. 705, 726-27, 35 L. Ed. 2d 147 (1973). We therefore remand this case for trial, at which time the State must prove in order to prevail that it has a compelling interest in regulating this behavior and that this statute is the most narrowly drawn means of safeguarding that interest.

REVERSED and REMANDED.

KRAVITCH, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority's conclusion that Hardwick has standing to challenge the constitutionality of the Georgia sodomy statute, but that the Does lack standing. I therefore concur in Part I of the majority opinion.

I must dissent from Part II of the majority opinion, however, because I believe that neither the court below nor this court has the authority to reach and decide the merits of Hardwick's constitutional claims.[1] The United States Supreme Court, in Doe v. Commonwealth's Attorney, 425 U.S. 901, 96 S. Ct. 1489, 47 L. Ed. 2d 751 (1976), summarily affirmed the judgment of a three-judge district court upholding the constitutionality of a Virginia sodomy statute nearly identical to Georgia's.[2] I find unpersuasive the arguments advanced by the majority for declining to follow Doe v. Commonwealth's Attorney. Therefore, I would affirm the district court's dismissal of Hardwick's complaint for failure to state a claim upon which relief could be granted.

As the majority acknowledges, a summary affirmance by the Supreme Court has binding precedential effect. Hicks v. Miranda, 422 U.S. 332, 344, 95 S. Ct. 2281, 2289, 45 L. Ed. 2d 223 (1975). Nevertheless, the majority holds that Doe v. Commonwealth's Attorney is not entitled to precedential weight because the summary affirmance might have been based on lack of standing, rather than on the merits of the constitutional issues involved.

Contrary to the majority's suggestion, we are not free to speculate that the summary affirmance in Doe v. Commonwealth's Attorney might have been based on lack of standing. First, the Supreme Court's discussion of summary affirmances in Hicks v. Miranda forecloses such speculation:

As Mr. Justice Brennan once observed, " [v]otes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case ...," Ohio ex rel. Eaton v. Price, 360 U.S. 246, 247, 79 S. Ct. 978, 979, 3 L. Ed. 2d 1200 (1959) ....

Id. at 344, 95 S. Ct. at 2289 (emphasis added); see also 12 J. Moore, H. Bendix & B. Ringle, Moore's Federal Practice p 400.05-1, at 4-25 (2d ed. 1982) (" [S]ummary affirmances of lower federal court judgments ... are decisions on the merits, and are binding on lower courts, in spite of the fact that such dispositions are made on the basis of the appellant's jurisdictional statement and the appellee's motion to dismiss or affirm, without oral argument or full briefs on the merits." (emphasis added)); C. Wright, Law of Federal Courts 757-58 (4th ed. 1983) ("Summary disposition of an appeal, however, either by affirmance or by dismissal for want of a substantial federal question, is a disposition on the merits." (emphasis added; footnote omitted)).

Second, the jurisdictional statement in Doe v. Commonwealth's Attorney mentioned the substantive constitutional issues involved in the case, but did not mention the issue of standing.[3] The Supreme Court has held that the jurisdictional statement limits the range

of permissible lower court interpretations of a summary disposition. See McCarthy v. Philadelphia Civil Service Comm'n, 424 U.S. 645, 96 S. Ct. 1154, 47 L. Ed. 2d 366 (1976); Colorado Springs Amusements, Ltd. v. Rizzo, 428 U.S. 913, 920 n. 6, 96 S. Ct. 3228, 3232 n. 6, 49 L. Ed. 2d 1222 (1976) (Brennan, J., dissenting from denial of certiorari).

Third, and most conclusively, if the Supreme Court had decided that the plaintiffs in Doe v. Commonwealth's Attorney lacked standing, the Court would not have had jurisdiction to decide the case. Therefore, the Court would have had to dismiss the appeal, instead of summarily affirming the judgment of the court below.[4] This would be the necessary result whether the lack of standing was the result of Article III case-or-controversy considerations,[5] or of purely prudential concerns.[6] In my view, the majority fails to address adequately this crucial distinction.

I thus disagree with the majority's conclusion that the Supreme Court in Doe v. Commonwealth's Attorney might not have reached the merits of the case. Like all summary affirmances, Doe v. Commonwealth's Attorney constitutes a decision on the merits, and, in the words of the Supreme Court, "the lower courts are bound by summary decisions 'until such time as the Court informs [them] that [they] are not.' " Hicks v. Miranda, 422 U.S. at 345-46, 95 S. Ct. at 2289 (quoting Doe v. Hodgson, 478 F.2d 537, 539 (2d Cir.), cert. denied, 414 U.S. 1096, 94 S. Ct. 732, 38 L. Ed. 2d 555 (1973)).

The majority also holds that, even if Doe v. Commonwealth's Attorney had binding precedential effect when it was decided, such effect has been undermined by recent doctrinal developments. In particular, the majority argues that two footnotes in Carey v. Population Services Int'l, 431 U.S. 678, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977), and the dismissal of the writ of certiorari in New York v. Uplinger, --- U.S. ----, 104 S. Ct. 2332, 81 L. Ed. 2d 201 (1984), indicate that the Supreme Court is now willing to reverse or reconsider Doe v. Commonwealth's Attorney. I respectfully disagree.

In footnotes 5 and 17 in Carey, the Supreme Court noted that "the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults." Carey, 431 U.S. at 688 n. 5, 97 S. Ct. at 2018 n. 5; id. at 694 n. 17, 97 S. Ct. at 2021 n. 17. I do not read this statement as a retreat from Doe v. Commonwealth's Attorney. On its face, the statement simply acknowledges the fact that the Court has not yet passed on the validity of many kinds of state statutes regulating sexual conduct.[7] The statement does not purport to overrule those cases, such as Doe v. Commonwealth's Attorney, in which the Court has passed on the validity of other such state statutes.[8]

It is clear from the context in which footnotes 5 and 17 appear in the Carey opinion that the majority's interpretation of those footnotes is erroneous. The plaintiffs in Carey argued that a New York law regulating the sale and distribution of contraceptives violated their right of privacy because the law infringed on their right to engage in "private consensual sexual behavior." The Supreme Court decided the case instead on a more narrow ground, however, and footnotes 5 and 17 constitute the Court's explanation for declining to adopt the plaintiffs' broad right of privacy argument. In effect, the Court was saying, "we have not extended the right of privacy as far as the plaintiffs would like." The Court was not saying, "it is now an open question whether the right of privacy invalidates all state statutes regulating any kind of private sexual conduct."

The dismissal of the writ of certiorari in New York v. Uplinger is an even less compelling reason for refusing to follow Doe v. Commonwealth's Attorney. In Uplinger, the Court faced a constitutional challenge not to the New York sodomy statute, but to a statute that prohibited loitering in a public place "for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature." N.Y. Penal Law Sec. 240.35-3. The New York Court of Appeals struck down the statute. 58 N.Y.2d 936, 447 N.E.2d 62, 460 N.Y.S.2d 514 (1983). The Supreme Court granted certiorari, --- U.S. ----, 104 S. Ct. 64, 78 L. Ed. 2d 80 (1983), but in a subsequent per curiam opinion dismissed the writ of certiorari as improvidently granted, --- U.S. ----, 104 S. Ct. 2332, 81 L. Ed. 2d 201 (1984).

The majority recognizes that a dismissal of certiorari, like a grant or denial of certiorari, normally has no precedential effect whatsoever.[9] Yet it construes the per curiam opinion accompanying the dismissal of certiorari in Uplinger as a "signal" from the Supreme Court that Doe v. Commonwealth's Attorney is no longer good law. This conclusion is based on the statement in the opinion that the case "provides an inappropriate vehicle for resolving the important constitutional issues raised by the parties." Uplinger, --- U.S. at ----, 104 S. Ct. at 2334. From this single ambiguous statement, the majority infers (1) that the "important constitutional issues" included whether the right of privacy requires invalidation of all state sodomy laws,[10] and (2) that the Supreme Court intended to reverse or reconsider Doe v. Commonwealth's Attorney, but decided to wait for another case to do so.[11] These are inferential leaps greater than I am willing or able to make.

Furthermore, even if the majority's inferences are correct, this would not mean that the lower courts are now free to ignore Doe v. Commonwealth's Attorney. That the Supreme Court ultimately found Uplinger an "inappropriate vehicle for resolving" whatever constitutional issues the case presented does not imply that those issues previously were

unresolved. Nor may this court reconsider the wisdom of Doe v. Commonwealth's Attorney simply because the Supreme Court may have indicated a possible willingness to do so. As the Supreme Court recently noted, "Needless to say, only this Court may overrule one of its precedents." Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd., 460 U.S. 533, 103 S. Ct. 1343, 75 L. Ed. 2d 260 (1983); see also Jaffree v. Wallace, 705 F.2d 1526, 1532-33 (11th Cir. 1983), appeal filed on other grounds, 52 U.S.L.W. 3441 (U.S. Nov. 14, 1983) (No. 83-812), 52 U.S.L.W. 3473 (U.S. Dec. 3, 1983) (No. 83-929), probable jurisdiction noted, --- U.S. ---, 104 S. Ct. 1704, 80 L. Ed. 2d 178 (1984). [12]

Whatever our personal views about the constitutionality of a law that permits the state to regulate the most private of human behavior within the confines of the home, unless and until the Supreme Court clearly indicates otherwise, we are bound by that Court's decision in Doe v. Commonwealth's Attorney. Respectfully, therefore, I dissent.

Section 16-6-2 provides as follows:
(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. A person commits the offense of aggravated sodomy when he commits sodomy with force and against the will of the other person.
(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years. A person convicted of the offense of aggravated sodomy shall be punished by imprisonment for life or by imprisonment for not less than one nor more than 20 years.

The defendants do not dispute that the enforcement of this statute causes the injury alleged by Hardwick and the Does or that the requested declaratory judgment would likely redress their injuries. Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976). Nor do they suggest any prudential reasons for this court to refuse to hear the case. See Warth v. Seldin, 422 U.S. 490, 499-500, 95 S. Ct. 2197, 2205-06, 45 L. Ed. 2d 343 (1975); Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 153, 90 S. Ct. 827, 829, 25 L. Ed. 2d 184 (1970). But see note 3, infra

The court in ISKCON v. Eaves concluded that the plaintiff's interest in violating the statute determined the Article III component of standing, while the State's enforcement interest

bore relevance only to the "prudential" aspect of the standing doctrine. This distinction does not influence our analysis of the standing of these plaintiffs, for we consider standing in both the constitutional and prudential senses

Because Hardwick appeals from a dismissal for failure to state a claim upon which relief can be granted, the allegations of his complaint must be taken as true. The same holds true for the Does, whose complaint was dismissed for lack of subject matter jurisdiction before the defendants filed any answer

The plaintiffs there had not been arrested for violation of the statute, nor did they present any evidence of threatened prosecutions or past prosecutions under the statute. At most, the plaintiffs had a "generalized grievance" regarding the statute and its enforcement that was insufficient to allow a federal court to reach the merits of their claim. Cf. Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 94 S. Ct. 2925, 41 L. Ed. 2d 706 (1974); Poe v. Ullman, 367 U.S. 497, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (1961)

The fact that the Supreme Court in Doe affirmed a dismissal on the merits below rather than vacating the judgment with instructions to dismiss for lack of subject matter jurisdiction does not demonstrate that the court reached the merits of the case. While an appellate court that finds lack of standing normally will vacate the judgment and remand for dismissal, the Supreme Court has not uniformly followed that course. Rizzo v. Goode, 423 U.S. 362, 96 S. Ct. 598, 46 L. Ed. 2d 561 (1976) (reversing decision on the merits due to lack of Article III standing); O'Shea v. Littleton, 414 U.S. 488, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974) (same). Moreover, the Court would be even less likely to vacate the judgment and remand for dismissal when a case presents prudential standing problems which, unlike constitutional standing requirements, do not bear on the very power of the court to hear the case. Warth v. Seldin, 422 U.S. 490, 499-501, 95 S. Ct. 2197, 2205-06, 45 L. Ed. 2d 343 (1975) ("reluctance to exert judicial power" due to prudential standing problems may be overcome by countervailing factors). The facts as described by the district court in Doe presented what appeared to be non-constitutional standing problems. Cf. Schlesinger v. Reservists Committee to Stop the War, supra; Poe v. Ullman, supra.

Similar reasoning applies to appellate jurisdiction. The special jurisdictional provisions of 28 U.S.C.A. Sec. 1253 (1966) confer appellate jurisdiction on the Supreme Court only when a three-judge court was properly convened. Therefore the Supreme Court will often dismiss the appeal and vacate the judgment below if the three-judge court dismissed the case due to a plaintiff's lack of constitutional standing. Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90, 95 S. Ct. 289, 42 L. Ed. 2d 249 (1974). However, the Supreme Court

has not held that it lacks appellate jurisdiction over an appeal from a dismissal on the merits by a three-judge court where the plaintiff lacks standing. Moreover, a three-judge court may be properly convened even when it could possibly decide the case on non-constitutional grounds. Alexander v. Fioto, 430 U.S. 634, 97 S. Ct. 1345, 51 L. Ed. 2d 694 (1977); Philbrook v. Glodgett, 421 U.S. 707, 712, 95 S. Ct. 1893, 1897, 44 L. Ed. 2d 525 (1975). The Supreme Court could therefore affirm a dismissal by a three-judge court if prudential standing problems hindered the court from hearing the merits; dismissal for lack of appellate jurisdiction would not be necessary.
The court in Poe v. Ullman, supra, dismissed the appeal rather than affirming the dismissal below because the plaintiffs there appealed from state court pursuant to 28 U.S.C.A. Sec. 1257 (1966). The Supreme Court refused to hear the merits because of prudential considerations binding only on federal courts. Since the state court had not faced the same bar to adjudication on the merits, dismissal of the appeal was the proper disposition.

The Doe affirmance could not control all of Hardwick's legal claims. He alleges that the Georgia statute violates his First Amendment freedom of association, a claim not addressed by the jurisdictional statement or the district court opinion in Doe

Note, On Privacy: Constitutional Protection for Personal Liberty, 48 N.Y.U. L. Rev. 670, 719-738 (1973)

The denial of a petition for writ of certiorari generally has no precedential value. Hughes Tool Co. v. Transworld Air Lines, Inc., 409 U.S. 363, 366 n. 1, 93 S. Ct. 647, 650 n. 1, 34 L. Ed. 2d 577 (1973). In this case, however, the Court granted certiorari, considered the briefs, heard oral argument, and dismissed the writ after explaining its reasons. We may draw appropriate inferences from such an order. See Brown v. Allen, 344 U.S. 443, 489-97, 73 S. Ct. 397, 437-41, 97 L. Ed. 469 (1953)

Contrary to the assertion of the dissent, we do not imply that the Supreme Court intended Uplinger to be a vehicle for overruling Doe. The dismissal in Uplinger suggests only that the court intended to consider the constitutional issue and resolve it one way or the other. Hence, speculation as to the views of the dissenting justices in Uplinger regarding the merits of that case does not influence our reading of the per curiam opinion

For this reason, I would not address the constitutional issues discussed in Part III of the majority opinion. If I thought that this court were empowered to reach those issues, however, I would agree with the majority that the Georgia sodomy statute should be tested under the "compelling interest" analysis set out in Roe v. Wade, 410 U.S. 113, 155, 93 S. Ct. 705, 728, 35 L. Ed. 2d 147 (1973)

The Georgia sodomy statute, O.C.G.A. Sec. 16-6-2 (1984), provides, in pertinent part:
(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another....
(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years....
The Virginia statute at issue in Doe v. Commonwealth's Attorney, Va.Code Sec. 18.1-212 (1950), provided, in pertinent part:
Crimes against nature.--If any person shall ... carnally know any male or female person by the anus or by or with the mouth, or voluntarily submit to such carnal knowledge, he or she shall be guilty of a felony and shall be confined in the penitentiary not less than one year nor more than three years.

Nor did the opinion of the three-judge district court mention the issue of standing. The opinion clearly reveals that the district court decided the case on the merits. See Doe v. Commonwealth's Attorney, 403 F. Supp. 1199, 1200-03 (E.D. Va. 1975)

It must be remembered that the judgment of the district court in Doe v. Commonwealth's Attorney, which is what the Supreme Court summarily affirmed, was a judgment on the merits. See supra note 3
The majority cites Rizzo v. Goode, 423 U.S. 362, 96 S. Ct. 598, 46 L. Ed. 2d 561 (1976), and O'Shea v. Littleton, 414 U.S. 488, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974), for the proposition that the Supreme Court does not always vacate the judgment below and remand for dismissal when the Court finds that the plaintiffs lacked standing. I do not quarrel with the majority's proposition. The crucial issue, however, is whether the Court could have summarily affirmed, on the basis of lack of standing, the lower court's decision in Doe v. Commonwealth's Attorney, or whether dismissal of the appeal would have been the required course. In Rizzo and O'Shea, the Supreme Court reversed a lower court decision rendered on the merits in favor of the plaintiffs. Other than the majority's interpretation of

Doe v. Commonwealth's Attorney, it has failed to cite a single instance in which the Court has affirmed, on the basis of lack of standing, a lower court decision rendered on the merits in favor of the defendants.

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See Warth v. Seldin, 422 U.S. 490, 498-499, 95 S. Ct. 2197, 2205, 45 L. Ed. 2d 343 (1975) ("In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit." (emphasis added))

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See, e.g., Poe v. Ullman, 367 U.S. 497, 509, 81 S. Ct. 1752, 1759, 6 L. Ed. 2d 989 (1961) (dismissing appeal because of prudential, rather than Article III, standing considerations)

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For example, the Court has not yet passed on the question whether the right of privacy invalidates state statutes prohibiting fornication. See, e.g., O.C.G.A. Sec. 16-6-18 (1984) (Georgia fornication statute)

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See Carey v. Population Services Int'l, 431 U.S. at 718 n. 2, 97 S. Ct. at 2033 n. 2 (Rehnquist, J., dissenting) ("While we have not ruled on every conceivable regulation affecting such conduct the facial constitutional validity of criminal statutes prohibiting certain consensual acts has been 'definitively' established." (emphasis added)). Contrary to the majority's view, Justice Rehnquist did not consider footnotes 5 and 17 in Carey to be in conflict with Doe v. Commonwealth's Attorney. Rather, he indicated that footnotes 5 and 17 can, and should, be interpreted consistently with Doe v. Commonwealth's Attorney

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All that can be said with certainty about Uplinger is that at least four Justices originally voted to hear the case, and that five Justices subsequently voted not to hear it. See id. at ----, 104 S. Ct. at 2335 (White, J., joined by Burger, C.J., Rehnquist and O'Connor, JJ., dissenting from dismissal of writ of certiorari)

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The plaintiffs in Uplinger raised vagueness, overbreadth, First Amendment, equal protection, and due process challenges to the New York statute. See id. at ----, 104 S. Ct. at

2333. The per curiam opinion dismissing the writ of certiorari did not identify which of these constitutional issues the Supreme Court felt were "important." Furthermore, as the majority notes, the Court was not even certain as to just what federal constitutional issues actually had been decided by the state court. Therefore, unlike the majority, I cannot conclude that the "important constitutional issues" referred to by the Court included the right of privacy and its effect on state sodomy laws

[1]

As the majority acknowledges, if Doe v. Commonwealth's Attorney indeed was a decision on the merits, then we are bound by that decision until the Supreme Court indicates a "willingness to reverse or reconsider" the case. I find highly questionable any inference that the Supreme Court originally viewed Uplinger as an appropriate vehicle for reversing or reconsidering Doe v. Commonwealth's Attorney. Three of the four Justices who dissented from the dismissal of the writ in Uplinger (and who presumably were among those originally voting to hear the case) were in the majority in Doe v. Commonwealth's Attorney, and two of the four dissented in Carey v. Population Services Int'l. See Uplinger, --- U.S. at ----, 104 S. Ct. at 2335 (White, J., joined by Burger, C.J., Rehnquist and O'Connor, JJ., dissenting from dismissal of writ of certiorari)

[2]

Nor can the majority rely on the Supreme Court's recent affirmance by an equally divided vote in Board of Educ. v. National Gay Task Force, --- U.S. ----, 105 S. Ct. 1858, 84 L. Ed. 2d 776 (1985). Affirmances by an equally divided vote are entitled to no precedential weight. Neil v. Biggers, 409 U.S. 188, 191-92, 93 S. Ct. 375, 378-79, 34 L. Ed. 2d 401 (1972); Ohio ex rel. Eaton v. Price, 364 U.S. 263, 264, 80 S. Ct. 1463, 1464, 4 L. Ed. 2d 1708 (1960). Furthermore, the Tenth Circuit had held that the right of privacy was not implicated by the Oklahoma statute involved in the case. See National Gay Task Force v. Board of Educ., 729 F.2d 1270, 1273 (10th Cir. 1984)

Michael Hardwick, et al., Plaintiffs-appellants, v. Michael Bowers, et al., Defendants-appellees, 804 F.2d 622 (11th Cir. 1986)

U.S. Court of Appeals for the Eleventh Circuit - 804 F.2d 622 (11th Cir. 1986)

Nov. 17, 1986

Kathleen L. Wilde, Atlanta, Ga., for plaintiffs-appellants.

Michael E. Hobbs, George M. Weaver, Asst. Attys. Gen., Atlanta, Ga., for Michael Bowers.

H. Allen Moye, Asst. Dist. Atty., Atlanta Judicial Circuit, Atlanta, Ga., for Slaton.

Marva Jones Brooks, George R. Ference, Atlanta, Ga., for Napper.

Nan D. Hunter, New York City, for ACLU.

Appeal from the United States District Court for the Northern District of Georgia; Robert H. Hall, District Judge.ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES,

--- U.S. ---, 106 S. Ct. 2841, 92 L. Ed. 2d 140

Before KRAVITCH and JOHNSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

JOHNSON, Circuit Judge:

Upon consideration of the opinion of the Supreme Court of the United States in Bowers v. Hardwick, et al., rendered June 30, 1986, and the mandate of that Court, it is ordered that the opinion of this Court in Hardwick v. Bowers, 760 F.2d 1202, reh. den., 765 F.2d 1123 (11th Cir. 1985), be and is hereby VACATED.

It is further ordered that this case be and it is hereby REMANDED to the district court for the entry of a judgment in accordance with the opinion and judgment of the Supreme Court of the United States.

BOWERS, ATTORNEY GENERAL OF GEORGIA *v.* HARDWICK ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 85–140. Argued March 31, 1986—Decided June 30, 1986

After being charged with violating the Georgia statute criminalizing sodomy by committing that act with another adult male in the bedroom of his home, respondent Hardwick (respondent) brought suit in Federal District Court, challenging the constitutionality of the statute insofar as it criminalized consensual sodomy. The court granted the defendants' motion to dismiss for failure to state a claim. The Court of Appeals reversed and remanded, holding that the Georgia statute violated respondent's fundamental rights.

Held: The Georgia statute is constitutional. Pp. 190–196.

(a) The Constitution does not confer a fundamental right upon homosexuals to engage in sodomy. None of the fundamental rights announced in this Court's prior cases involving family relationships, marriage, or procreation bear any resemblance to the right asserted in this case. And any claim that those cases stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable. Pp. 190–191.

(b) Against a background in which many States have criminalized sodomy and still do, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious. Pp. 191–194.

(c) There should be great resistance to expand the reach of the Due Process Clauses to cover new fundamental rights. Otherwise, the Judiciary necessarily would take upon itself further authority to govern the country without constitutional authority. The claimed right in this case falls far short of overcoming this resistance. Pp. 194–195.

(d) The fact that homosexual conduct occurs in the privacy of the home does not affect the result. *Stanley* v. *Georgia*, 394 U. S. 557, distinguished. Pp. 195–196.

(e) Sodomy laws should not be invalidated on the asserted basis that majority belief that sodomy is immoral is an inadequate rationale to support the laws. P. 196.

760 F. 2d 1202, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BURGER, C. J., *post*, p. 196, and POWELL, J., *post*, p. 197, filed concurring opinions. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, p. 199. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 214.

Michael E. Hobbs, Senior Assistant Attorney General of Georgia, argued the cause for petitioner. With him on the briefs were *Michael J. Bowers*, Attorney General, *pro se*, *Marion O. Gordon*, First Assistant Attorney General, and *Daryl A. Robinson*, Senior Assistant Attorney General.

Laurence H. Tribe argued the cause for respondent Hardwick. With him on the brief were *Kathleen M. Sullivan* and *Kathleen L. Wilde*.*

JUSTICE WHITE delivered the opinion of the Court.

In August 1982, respondent Hardwick (hereafter respondent) was charged with violating the Georgia statute crimi-

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*Briefs of *amici curiae* urging reversal were filed for the Catholic League for Religious and Civil Rights by *Steven Frederick McDowell;* for the Rutherford Institute et al. by *W. Charles Bundren, Guy O. Farley, Jr., George M. Weaver, William B. Hollberg, Wendell R. Bird, John W. Whitehead, Thomas O. Kotouc,* and *Alfred Lindh;* and for David Robinson, Jr., *pro se.*

Briefs of *amici curiae* urging affirmance were filed for the State of New York et al. by *Robert Abrams*, Attorney General of New York, *Robert Hermann*, Solicitor General, *Lawrence S. Kahn, Howard L. Zwickel, Charles R. Fraser*, and *Sanford M. Cohen*, Assistant Attorneys General, and *John Van de Kamp*, Attorney General of California; for the American Jewish Congress by *Daniel D. Levenson, David Cohen*, and *Frederick Mandel;* for the American Psychological Association et al. by *Margaret Farrell Ewing, Donald N. Bersoff, Anne Simon, Nadine Taub*, and *Herbert Semmel;* for the Association of the Bar of the City of New York by *Steven A. Rosen;* for the National Organization for Women by *John S. L. Katz;* and for the Presbyterian Church (U. S. A.) et al. by *Jeffrey O. Bramlett.*

Briefs of *amici curiae* were filed for the Lesbian Rights Project et al. by *Mary C. Dunlap;* and for the National Gay Rights Advocates et al. by *Edward P. Errante, Leonard Graff*, and *Jay Kohorn.*

nalizing sodomy[1] by committing that act with another adult male in the bedroom of respondent's home. After a preliminary hearing, the District Attorney decided not to present the matter to the grand jury unless further evidence developed.

Respondent then brought suit in the Federal District Court, challenging the constitutionality of the statute insofar as it criminalized consensual sodomy.[2] He asserted that he was a practicing homosexual, that the Georgia sodomy statute, as administered by the defendants, placed him in imminent danger of arrest, and that the statute for several reasons violates the Federal Constitution. The District Court granted the defendants' motion to dismiss for failure to state a claim, relying on *Doe* v. *Commonwealth's Attorney for the City of Richmond*, 403 F. Supp. 1199 (ED Va. 1975), which this Court summarily affirmed, 425 U. S. 901 (1976).

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[1] Georgia Code Ann. § 16-6-2 (1984) provides, in pertinent part, as follows:

"(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. . . .

"(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years. . . ."

[2] John and Mary Doe were also plaintiffs in the action. They alleged that they wished to engage in sexual activity proscribed by § 16-6-2 in the privacy of their home, App. 3, and that they had been "chilled and deterred" from engaging in such activity by both the existence of the statute and Hardwick's arrest. *Id.*, at 5. The District Court held, however, that because they had neither sustained, nor were in immediate danger of sustaining, any direct injury from the enforcement of the statute, they did not have proper standing to maintain the action. *Id.*, at 18. The Court of Appeals affirmed the District Court's judgment dismissing the Does' claim for lack of standing, 760 F. 2d 1202, 1206-1207 (CA11 1985), and the Does do not challenge that holding in this Court.

The only claim properly before the Court, therefore, is Hardwick's challenge to the Georgia statute as applied to consensual homosexual sodomy. We express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy.

A divided panel of the Court of Appeals for the Eleventh Circuit reversed. 760 F. 2d 1202 (1985). The court first held that, because *Doe* was distinguishable and in any event had been undermined by later decisions, our summary affirmance in that case did not require affirmance of the District Court. Relying on our decisions in *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972); *Stanley* v. *Georgia*, 394 U. S. 557 (1969); and *Roe* v. *Wade*, 410 U. S. 113 (1973), the court went on to hold that the Georgia statute violated respondent's fundamental rights because his homosexual activity is a private and intimate association that is beyond the reach of state regulation by reason of the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment. The case was remanded for trial, at which, to prevail, the State would have to prove that the statute is supported by a compelling interest and is the most narrowly drawn means of achieving that end.

Because other Courts of Appeals have arrived at judgments contrary to that of the Eleventh Circuit in this case,[3] we granted the Attorney General's petition for certiorari questioning the holding that the sodomy statute violates the fundamental rights of homosexuals. We agree with petitioner that the Court of Appeals erred, and hence reverse its judgment.[4]

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[3] See *Baker* v. *Wade*, 769 F. 2d 289, rehearing denied, 774 F. 2d 1285 (CA5 1985) (en banc); *Dronenburg* v. *Zech*, 239 U. S. App. D. C. 229, 741 F. 2d 1388, rehearing denied, 241 U. S. App. D. C. 262, 746 F. 2d 1579 (1984).

[4] Petitioner also submits that the Court of Appeals erred in holding that the District Court was not obligated to follow our summary affirmance in *Doe*. We need not resolve this dispute, for we prefer to give plenary consideration to the merits of this case rather than rely on our earlier action in *Doe*. See *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 14 (1976); *Massachusetts Board of Retirement* v. *Murgia*, 427 U. S. 307, 309, n. 1 (1976); *Edelman* v. *Jordan*, 415 U. S. 651, 671 (1974). Cf. *Hicks* v. *Miranda*, 422 U. S. 332, 344 (1975).

This case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable. It raises no question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state-court decisions invalidating those laws on state constitutional grounds. The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time. The case also calls for some judgment about the limits of the Court's role in carrying out its constitutional mandate.

We first register our disagreement with the Court of Appeals and with respondent that the Court's prior cases have construed the Constitution to confer a right of privacy that extends to homosexual sodomy and for all intents and purposes have decided this case. The reach of this line of cases was sketched in *Carey* v. *Population Services International*, 431 U. S. 678, 685 (1977). *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), and *Meyer* v. *Nebraska*, 262 U. S. 390 (1923), were described as dealing with child rearing and education; *Prince* v. *Massachusetts*, 321 U. S. 158 (1944), with family relationships; *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535 (1942), with procreation; *Loving* v. *Virginia*, 388 U. S. 1 (1967), with marriage; *Griswold* v. *Connecticut*, *supra*, and *Eisenstadt* v. *Baird*, *supra*, with contraception; and *Roe* v. *Wade*, 410 U. S. 113 (1973), with abortion. The latter three cases were interpreted as construing the Due Process Clause of the Fourteenth Amendment to confer a fundamental individual right to decide whether or not to beget or bear a child. *Carey* v. *Population Services International*, *supra*, at 688–689.

Accepting the decisions in these cases and the above description of them, we think it evident that none of the rights announced in those cases bears any resemblance to the

claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent. Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable. Indeed, the Court's opinion in *Carey* twice asserted that the privacy right, which the *Griswold* line of cases found to be one of the protections provided by the Due Process Clause, did not reach so far. 431 U. S., at 688, n. 5, 694, n. 17.

Precedent aside, however, respondent would have us announce, as the Court of Appeals did, a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do. It is true that despite the language of the Due Process Clauses of the Fifth and Fourteenth Amendments, which appears to focus only on the processes by which life, liberty, or property is taken, the cases are legion in which those Clauses have been interpreted to have substantive content, subsuming rights that to a great extent are immune from federal or state regulation or proscription. Among such cases are those recognizing rights that have little or no textual support in the constitutional language. *Meyer*, *Prince*, and *Pierce* fall in this category, as do the privacy cases from *Griswold* to *Carey*.

Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection. In *Palko* v. *Connecticut*, 302 U. S. 319, 325, 326 (1937), it was said that this category includes those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither

liberty nor justice would exist if [they] were sacrificed." A different description of fundamental liberties appeared in *Moore* v. *East Cleveland*, 431 U. S. 494, 503 (1977) (opinion of POWELL, J.), where they are characterized as those liberties that are "deeply rooted in this Nation's history and tradition." *Id.*, at 503 (POWELL, J.). See also *Griswold* v. *Connecticut*, 381 U. S., at 506.

It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots. See generally Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity, 40 U. Miami L. Rev. 521, 525 (1986). Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights.[5] In 1868, when the Fourteenth Amendment was

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[5] Criminal sodomy laws in effect in 1791:

Connecticut: 1 Public Statute Laws of the State of Connecticut, 1808, Title LXVI, ch. 1, § 2 (rev. 1672).

Delaware: 1 Laws of the State of Delaware, 1797, ch. 22, § 5 (passed 1719).

Georgia had no criminal sodomy statute until 1816, but sodomy was a crime at common law, and the General Assembly adopted the common law of England as the law of Georgia in 1784. The First Laws of the State of Georgia, pt. 1, p. 290 (1981).

Maryland had no criminal sodomy statute in 1791. Maryland's Declaration of Rights, passed in 1776, however, stated that "the inhabitants of Maryland are entitled to the common law of England," and sodomy was a crime at common law. 4 W. Swindler, Sources and Documents of United States Constitutions 372 (1975).

Massachusetts: Acts and Laws passed by the General Court of Massachusetts, ch. 14, Act of Mar. 3, 1785.

New Hampshire passed its first sodomy statute in 1718. Acts and Laws of New Hampshire 1680–1726, p. 141 (1978).

Sodomy was a crime at common law in New Jersey at the time of the ratification of the Bill of Rights. The State enacted its first criminal sodomy law five years later. Acts of the Twentieth General Assembly, Mar. 18, 1796, ch. DC, § 7.

New York: Laws of New York, ch. 21 (passed 1787).

ratified, all but 5 of the 37 States in the Union had criminal sodomy laws.[6] In fact, until 1961,[7] all 50 States outlawed sodomy, and today, 24 States and the District of Columbia

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At the time of ratification of the Bill of Rights, North Carolina had adopted the English statute of Henry VIII outlawing sodomy. See Collection of the Statutes of the Parliament of England in Force in the State of North-Carolina, ch. 17, p. 314 (Martin ed. 1792).

Pennsylvania: Laws of the Fourteenth General Assembly of the Commonwealth of Pennsylvania, ch. CLIV, § 2 (passed 1790).

Rhode Island passed its first sodomy law in 1662. The Earliest Acts and Laws of the Colony of Rhode Island and Providence Plantations 1647–1719, p. 142 (1977).

South Carolina: Public Laws of the State of South Carolina, p. 49 (1790).

At the time of the ratification of the Bill of Rights, Virginia had no specific statute outlawing sodomy, but had adopted the English common law. 9 Hening's Laws of Virginia, ch. 5, § 6, p. 127 (1821) (passed 1776).

[6] Criminal sodomy statutes in effect in 1868:

Alabama: Ala. Rev. Code § 3604 (1867).

Arizona (Terr.): Howell Code, ch. 10, § 48 (1865).

Arkansas: Ark. Stat., ch. 51, Art. IV, § 5 (1858).

California: 1 Cal. Gen. Laws, ¶ 1450, § 48 (1865).

Colorado (Terr.): Colo. Rev. Stat., ch. 22, §§ 45, 46 (1868).

Connecticut: Conn. Gen. Stat., Tit. 122, ch. 7, § 124 (1866).

Delaware: Del. Rev. Stat., ch. 131, § 7 (1893).

Florida: Fla. Rev. Stat., div. 5, § 2614 (passed 1868) (1892).

Georgia: Ga. Code §§ 4286, 4287, 4290 (1867).

Kingdom of Hawaii: Haw. Penal Code, ch. 13, § 11 (1869).

Illinois: Ill. Rev. Stat., div. 5, §§ 49, 50 (1845).

Kansas (Terr.): Kan. Stat., ch. 53, § 7 (1855).

Kentucky: 1 Ky. Rev. Stat., ch. 28, Art. IV, § 11 (1860).

Louisiana: La. Rev. Stat., Crimes and Offences, § 5 (1856).

Maine: Me. Rev. Stat., Tit. XII, ch. 160, § 4 (1840).

Maryland: 1 Md. Code, Art. 30, § 201 (1860).

Massachusetts: Mass. Gen. Stat., ch. 165, § 18 (1860).

Michigan: Mich. Rev. Stat., Tit. 30, ch. 158, § 16 (1846).

Minnesota: Minn. Stat., ch. 96, § 13 (1859).

Mississippi: Miss. Rev. Code, ch. 64, § LII, Art. 238 (1857).

Missouri: 1 Mo. Rev. Stat., ch. 50, Art. VIII, § 7 (1856).

Montana (Terr.): Mont. Acts, Resolutions, Memorials, Criminal Practice Acts, ch. IV, § 44 (1866).

Nebraska (Terr.): Neb. Rev. Stat., Crim. Code, ch. 4, § 47 (1866).

[Footnote 6 is continued on p. 194]

continue to provide criminal penalties for sodomy performed in private and between consenting adults. See Survey, U. Miami L. Rev., *supra*, at 524, n. 9. Against this background, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious.

Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudi-

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Nevada (Terr.): Nev. Comp. Laws, 1861–1900, Crimes and Punishments, § 45.

New Hampshire: N. H. Laws, Act. of June 19, 1812, § 5 (1815).

New Jersey: N. J. Rev. Stat., Tit. 8, ch. 1, § 9 (1847).

New York: 3 N. Y. Rev. Stat., pt. 4, ch. 1, Tit. 5, § 20 (5th ed. 1859).

North Carolina: N. C. Rev. Code, ch. 34, § 6 (1855).

Oregon: Laws of Ore., Crimes—Against Morality, etc., ch. 7, § 655 (1874).

Pennsylvania: Act of Mar. 31, 1860, § 32, Pub. L. 392, in 1 Digest of Statute Law of Pa. 1700–1903, p. 1011 (Purdon 1905).

Rhode Island: R. I. Gen. Stat., ch. 232, § 12 (1872).

South Carolina: Act of 1712, in 2 Stat. at Large of S. C. 1682–1716, p. 493 (1837).

Tennessee: Tenn. Code, ch. 8, Art. 1, § 4843 (1858).

Texas: Tex. Rev. Stat., Tit. 10, ch. 5, Art. 342 (1887) (passed 1860).

Vermont: Acts and Laws of the State of Vt. (1779).

Virginia: Va. Code, ch. 149, § 12 (1868).

West Virginia: W. Va. Code, ch. 149, § 12 (1868).

Wisconsin (Terr.): Wis. Stat. § 14, p. 367 (1839).

[7] In 1961, Illinois adopted the American Law Institute's Model Penal Code, which decriminalized adult, consensual, private, sexual conduct. Criminal Code of 1961, §§ 11–2, 11–3, 1961 Ill. Laws, pp. 1985, 2006 (codified as amended at Ill. Rev. Stat., ch. 38, ¶¶ 11–2, 11–3 (1983) (repealed 1984)). See American Law Institute, Model Penal Code § 213.2 (Proposed Official Draft 1962).

ation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.

Respondent, however, asserts that the result should be different where the homosexual conduct occurs in the privacy of the home. He relies on *Stanley* v. *Georgia*, 394 U. S. 557 (1969), where the Court held that the First Amendment prevents conviction for possessing and reading obscene material in the privacy of one's home: "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his house, what books he may read or what films he may watch." *Id.*, at 565.

Stanley did protect conduct that would not have been protected outside the home, and it partially prevented the enforcement of state obscenity laws; but the decision was firmly grounded in the First Amendment. The right pressed upon us here has no similar support in the text of the Constitution, and it does not qualify for recognition under the prevailing principles for construing the Fourteenth Amendment. Its limits are also difficult to discern. Plainly enough, otherwise illegal conduct is not always immunized whenever it occurs in the home. Victimless crimes, such as the possession and use of illegal drugs, do not escape the law where they are committed at home. *Stanley* itself recognized that its holding offered no protection for the possession in the home of drugs, firearms, or stolen goods. *Id.*, at 568, n. 11. And if respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct

while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road.

Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.[8]

Accordingly, the judgment of the Court of Appeals is

Reversed.

CHIEF JUSTICE BURGER, concurring.

I join the Court's opinion, but I write separately to underscore my view that in constitutional terms there is no such thing as a fundamental right to commit homosexual sodomy.

As the Court notes, *ante*, at 192, the proscriptions against sodomy have very "ancient roots." Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeao-Christian moral and ethical standards. Homosexual sodomy was a capital crime under Roman law. See Code Theod. 9.7.6; Code Just. 9.9.31. See also D. Bailey, Homosexuality

[8] Respondent does not defend the judgment below based on the Ninth Amendment, the Equal Protection Clause, or the Eighth Amendment.

and the Western Christian Tradition 70–81 (1975). During the English Reformation when powers of the ecclesiastical courts were transferred to the King's Courts, the first English statute criminalizing sodomy was passed. 25 Hen. VIII, ch. 6. Blackstone described "the infamous *crime against nature*" as an offense of "deeper malignity" than rape, a heinous act "the very mention of which is a disgrace to human nature," and "a crime not fit to be named." 4 W. Blackstone, Commentaries *215. The common law of England, including its prohibition of sodomy, became the received law of Georgia and the other Colonies. In 1816 the Georgia Legislature passed the statute at issue here, and that statute has been continuously in force in one form or another since that time. To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.

This is essentially not a question of personal "preferences" but rather of the legislative authority of the State. I find nothing in the Constitution depriving a State of the power to enact the statute challenged here.

JUSTICE POWELL, concurring.

I join the opinion of the Court. I agree with the Court that there is no fundamental right—*i. e.*, no substantive right under the Due Process Clause—such as that claimed by respondent Hardwick, and found to exist by the Court of Appeals. This is not to suggest, however, that respondent may not be protected by the Eighth Amendment of the Constitution. The Georgia statute at issue in this case, Ga. Code Ann. § 16–6–2 (1984), authorizes a court to imprison a person for up to 20 years for a single private, consensual act of sodomy. In my view, a prison sentence for such conduct—certainly a sentence of long duration—would create a serious Eighth Amendment issue. Under the Georgia statute a single act of sodomy, even in the private setting of a home, is a

felony comparable in terms of the possible sentence imposed to serious felonies such as aggravated battery, § 16–5–24, first-degree arson, § 16–7–60, and robbery, § 16–8–40.[1]

In this case, however, respondent has not been tried, much less convicted and sentenced.[2] Moreover, respondent has not raised the Eighth Amendment issue below. For these reasons this constitutional argument is not before us.

[1] Among those States that continue to make sodomy a crime, Georgia authorizes one of the longest possible sentences. See Ala. Code § 13A–6–65(a)(3) (1982) (1-year maximum); Ariz. Rev. Stat. Ann. §§ 13–1411, 13–1412 (West Supp. 1985) (30 days); Ark. Stat. Ann. § 41–1813 (1977) (1-year maximum); D. C. Code § 22–3502 (1981) (10-year maximum); Fla. Stat. § 800.02 (1985) (60-day maximum); Ga. Code Ann. § 16–6–2 (1984) (1 to 20 years); Idaho Code § 18–6605 (1979) (5-year minimum); Kan. Stat. Ann. § 21–3505 (Supp. 1985) (6-month maximum); Ky. Rev. Stat. § 510.100 (1985) (90 days to 12 months); La. Rev. Stat. Ann. § 14:89 (West 1986) (5-year maximum); Md. Ann. Code, Art. 27, §§ 553–554 (1982) (10-year maximum); Mich. Comp. Laws § 750.158 (1968) (15-year maximum); Minn. Stat. § 609.293 (1984) (1-year maximum); Miss. Code Ann. § 97–29–59 (1973) (10-year maximum); Mo. Rev. Stat. § 566.090 (Supp. 1984) (1-year maximum); Mont. Code Ann. § 45–5–505 (1985) (10-year maximum); Nev. Rev. Stat. § 201.190 (1985) (6-year maximum); N. C. Gen. Stat. § 14–177 (1981) (10-year maximum); Okla. Stat., Tit. 21, § 886 (1981) (10-year maximum); R. I. Gen. Laws § 11–10–1 (1981) (7 to 20 years); S. C. Code § 16–15–120 (1985) (5-year maximum); Tenn. Code Ann. § 39–2–612 (1982) (5 to 15 years); Tex. Penal Code Ann. § 21.06 (1974) ($200 maximum fine); Utah Code Ann. § 76–5–403 (1978) (6-month maximum); Va. Code § 18.2–361 (1982) (5-year maximum).

[2] It was conceded at oral argument that, prior to the complaint against respondent Hardwick, there had been no reported decision involving prosecution for private homosexual sodomy under this statute for several decades. See *Thompson* v. *Aldredge*, 187 Ga. 467, 200 S. E. 799 (1939). Moreover, the State has declined to present the criminal charge against Hardwick to a grand jury, and this is a suit for declaratory judgment brought by respondents challenging the validity of the statute. The history of nonenforcement suggests the moribund character today of laws criminalizing this type of private, consensual conduct. Some 26 States have repealed similar statutes. But the constitutional validity of the Georgia statute was put in issue by respondents, and for the reasons stated by the Court, I cannot say that conduct condemned for hundreds of years has now become a fundamental right.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS join, dissenting.

This case is no more about "a fundamental right to engage in homosexual sodomy," as the Court purports to declare, *ante*, at 191, than *Stanley* v. *Georgia*, 394 U. S. 557 (1969), was about a fundamental right to watch obscene movies, or *Katz* v. *United States*, 389 U. S. 347 (1967), was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about "the most comprehensive of rights and the right most valued by civilized men," namely, "the right to be let alone." *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting).

The statute at issue, Ga. Code Ann. § 16–6–2 (1984), denies individuals the right to decide for themselves whether to engage in particular forms of private, consensual sexual activity. The Court concludes that § 16–6–2 is valid essentially because "the laws of . . . many States . . . still make such conduct illegal and have done so for a very long time." *Ante*, at 190. But the fact that the moral judgments expressed by statutes like § 16–6–2 may be "'natural and familiar . . . ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.'" *Roe* v. *Wade*, 410 U. S. 113, 117 (1973), quoting *Lochner* v. *New York*, 198 U. S. 45, 76 (1905) (Holmes, J., dissenting). Like Justice Holmes, I believe that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897). I believe we must analyze respondent Hardwick's claim in the light of the values that underlie the constitutional right to privacy. If that right means anything, it means that, before Georgia can prosecute its citizens for making choices about the most inti-

mate aspects of their lives, it must do more than assert that the choice they have made is an "'abominable crime not fit to be named among Christians.'" *Herring* v. *State*, 119 Ga. 709, 721, 46 S. E. 876, 882 (1904).

I

In its haste to reverse the Court of Appeals and hold that the Constitution does not "confe[r] a fundamental right upon homosexuals to engage in sodomy," *ante*, at 190, the Court relegates the actual statute being challenged to a footnote and ignores the procedural posture of the case before it. A fair reading of the statute and of the complaint clearly reveals that the majority has distorted the question this case presents.

First, the Court's almost obsessive focus on homosexual activity is particularly hard to justify in light of the broad language Georgia has used. Unlike the Court, the Georgia Legislature has not proceeded on the assumption that homosexuals are so different from other citizens that their lives may be controlled in a way that would not be tolerated if it limited the choices of those other citizens. Cf. *ante*, at 188, n. 2. Rather, Georgia has provided that "[a] person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." Ga. Code Ann. § 16–6–2(a) (1984). The sex or status of the persons who engage in the act is irrelevant as a matter of state law. In fact, to the extent I can discern a legislative purpose for Georgia's 1968 enactment of § 16–6–2, that purpose seems to have been to broaden the coverage of the law to reach heterosexual as well as homosexual activity.[1] I therefore see no basis for the

[1] Until 1968, Georgia defined sodomy as "the carnal knowledge and connection against the order of nature, by man with man, or in the same unnatural manner with woman." Ga. Crim. Code § 26–5901 (1933). In *Thompson* v. *Aldredge*, 187 Ga. 467, 200 S. E. 799 (1939), the Georgia Supreme Court held that § 26–5901 did not prohibit lesbian activity. And in *Riley* v. *Garrett*, 219 Ga. 345, 133 S. E. 2d 367 (1963), the Georgia

Court's decision to treat this case as an "as applied" challenge to § 16–6–2, see *ante*, at 188, n. 2, or for Georgia's attempt, both in its brief and at oral argument, to defend § 16–6–2 solely on the grounds that it prohibits homosexual activity. Michael Hardwick's standing may rest in significant part on Georgia's apparent willingness to enforce against homosexuals a law it seems not to have any desire to enforce against heterosexuals. See Tr. of Oral Arg. 4–5; cf. 760 F. 2d 1202, 1205–1206 (CA11 1985). But his claim that § 16–6–2 involves an unconstitutional intrusion into his privacy and his right of intimate association does not depend in any way on his sexual orientation.

Second, I disagree with the Court's refusal to consider whether § 16–6–2 runs afoul of the Eighth or Ninth Amendments or the Equal Protection Clause of the Fourteenth Amendment. *Ante*, at 196, n. 8. Respondent's complaint expressly invoked the Ninth Amendment, see App. 6, and he relied heavily before this Court on *Griswold* v. *Connecticut*, 381 U. S. 479, 484 (1965), which identifies that Amendment as one of the specific constitutional provisions giving "life and substance" to our understanding of privacy. See Brief for Respondent Hardwick 10–12; Tr. of Oral Arg. 33. More importantly, the procedural posture of the case requires that we affirm the Court of Appeals' judgment if there is *any* ground on which respondent may be entitled to relief. This case is before us on petitioner's motion to dismiss for failure to state a claim, Fed. Rule Civ. Proc. 12(b)(6). See App. 17. It is a well-settled principle of law that "a complaint should not be dismissed merely because a plaintiff's allegations do not support the particular legal theory he advances, for the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory."

Supreme Court held that § 26–5901 did not prohibit heterosexual cunnilingus. Georgia passed the act-specific statute currently in force "perhaps in response to the restrictive court decisions such as *Riley*," Note, The Crimes Against Nature, 16 J. Pub. L. 159, 167, n. 47 (1967).

Bramlet v. *Wilson*, 495 F. 2d 714, 716 (CA8 1974); see *Parr* v. *Great Lakes Express Co.*, 484 F. 2d 767, 773 (CA7 1973); *Due* v. *Tallahassee Theatres, Inc.*, 333 F. 2d 630, 631 (CA5 1964); *United States* v. *Howell*, 318 F. 2d 162, 166 (CA9 1963); 5 C. Wright & A. Miller, Federal Practice and Procedure § 1357, pp. 601–602 (1969); see also *Conley* v. *Gibson*, 355 U. S. 41, 45–46 (1957). Thus, even if respondent did not advance claims based on the Eighth or Ninth Amendments, or on the Equal Protection Clause, his complaint should not be dismissed if any of those provisions could entitle him to relief. I need not reach either the Eighth Amendment or the Equal Protection Clause issues because I believe that Hardwick has stated a cognizable claim that § 16–6–2 interferes with constitutionally protected interests in privacy and freedom of intimate association. But neither the Eighth Amendment nor the Equal Protection Clause is so clearly irrelevant that a claim resting on either provision should be peremptorily dismissed.[2] The Court's cramped reading of the

[2] In *Robinson* v. *California*, 370 U. S. 660 (1962), the Court held that the Eighth Amendment barred convicting a defendant due to his "status" as a narcotics addict, since that condition was "apparently an illness which may be contracted innocently or involuntarily." *Id.*, at 667. In *Powell* v. *Texas*, 392 U. S. 514 (1968), where the Court refused to extend *Robinson* to punishment of public drunkenness by a chronic alcoholic, one of the factors relied on by JUSTICE MARSHALL, in writing the plurality opinion, was that Texas had not "attempted to regulate appellant's behavior in the privacy of his own home." *Id.*, at 532. JUSTICE WHITE wrote separately:

"Analysis of this difficult case is not advanced by preoccupation with the label 'condition.' In *Robinson* the Court dealt with 'a statute which makes the "status" of narcotic addiction a criminal offense . . . .' 370 U. S., at 666. By precluding criminal conviction for such a 'status' the Court was dealing with a condition brought about by acts remote in time from the application of the criminal sanctions contemplated, a condition which was relatively permanent in duration, and a condition of great magnitude and significance in terms of human behavior and values. . . . If it were necessary to distinguish between 'acts' and 'conditions' for purposes of the Eighth Amendment, I would adhere to the concept of 'condition' implicit in the opinion in *Robinson* . . . . The proper subject of inquiry is whether volitional acts brought about the 'condition' and whether those acts are suf-

issue before it makes for a short opinion, but it does little to make for a persuasive one.

II

"Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government." *Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U. S. 747, 772 (1986). In construing the right to privacy, the Court has proceeded along two somewhat dis-

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ficiently proximate to the 'condition' for it to be permissible to impose penal sanctions on the 'condition.'" *Id.*, at 550–551, n. 2.

Despite historical views of homosexuality, it is no longer viewed by mental health professionals as a "disease" or disorder. See Brief for American Psychological Association and American Public Health Association as *Amici Curiae* 8–11. But, obviously, neither is it simply a matter of deliberate personal election. Homosexual orientation may well form part of the very fiber of an individual's personality. Consequently, under JUSTICE WHITE's analysis in *Powell*, the Eighth Amendment may pose a constitutional barrier to sending an individual to prison for acting on that attraction regardless of the circumstances. An individual's ability to make constitutionally protected "decisions concerning sexual relations," *Carey* v. *Population Services International*, 431 U. S. 678, 711 (1977) (POWELL, J., concurring in part and concurring in judgment), is rendered empty indeed if he or she is given no real choice but a life without any physical intimacy.

With respect to the Equal Protection Clause's applicability to § 16–6–2, I note that Georgia's exclusive stress before this Court on its interest in prosecuting homosexual activity despite the gender-neutral terms of the statute may raise serious questions of discriminatory enforcement, questions that cannot be disposed of before this Court on a motion to dismiss. See *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373–374 (1886). The legislature having decided that the sex of the participants is irrelevant to the legality of the acts, I do not see why the State can defend § 16–6–2 on the ground that individuals singled out for prosecution are of the same sex as their partners. Thus, under the circumstances of this case, a claim under the Equal Protection Clause may well be available without having to reach the more controversial question whether homosexuals are a suspect class. See, *e. g.*, *Rowland* v. *Mad River Local School District*, 470 U. S. 1009 (1985) (BRENNAN, J., dissenting from denial of certiorari); Note, The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification, 98 Harv. L. Rev. 1285 (1985).

tinct, albeit complementary, lines. First, it has recognized a privacy interest with reference to certain *decisions* that are properly for the individual to make. *E. g.*, *Roe* v. *Wade*, 410 U. S. 113 (1973); *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925). Second, it has recognized a privacy interest with reference to certain *places* without regard for the particular activities in which the individuals who occupy them are engaged. *E. g.*, *United States* v. *Karo*, 468 U. S. 705 (1984); *Payton* v. *New York*, 445 U. S. 573 (1980); *Rios* v. *United States*, 364 U. S. 253 (1960). The case before us implicates both the decisional and the spatial aspects of the right to privacy.

A

The Court concludes today that none of our prior cases dealing with various decisions that individuals are entitled to make free of governmental interference "bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case." *Ante*, at 190–191. While it is true that these cases may be characterized by their connection to protection of the family, see *Roberts* v. *United States Jaycees*, 468 U. S. 609, 619 (1984), the Court's conclusion that they extend no further than this boundary ignores the warning in *Moore* v. *East Cleveland*, 431 U. S. 494, 501 (1977) (plurality opinion), against "clos[ing] our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause." We protect those rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life. "[T]he concept of privacy embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole.'" *Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U. S., at 777, n. 5 (STEVENS, J., concurring), quoting Fried, Correspondence, 6 Phil. & Pub. Affairs 288–289 (1977). And so we protect the decision whether to

marry precisely because marriage "is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." *Griswold* v. *Connecticut*, 381 U. S., at 486. We protect the decision whether to have a child because parenthood alters so dramatically an individual's self-definition, not because of demographic considerations or the Bible's command to be fruitful and multiply. Cf. *Thornburgh* v. *American College of Obstetricians & Gynecologists*, *supra*, at 777, n. 6 (STEVENS, J., concurring). And we protect the family because it contributes so powerfully to the happiness of individuals, not because of a preference for stereotypical households. Cf. *Moore* v. *East Cleveland*, 431 U. S., at 500–506 (plurality opinion). The Court recognized in *Roberts*, 468 U. S., at 619, that the "ability independently to define one's identity that is central to any concept of liberty" cannot truly be exercised in a vacuum; we all depend on the "emotional enrichment from close ties with others." *Ibid.*

Only the most willful blindness could obscure the fact that sexual intimacy is "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality," *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 63 (1973); see also *Carey* v. *Population Services International*, 431 U. S. 678, 685 (1977). The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds. See Karst, The Freedom of Intimate Association, 89 Yale L. J. 624, 637 (1980); cf. *Eisenstadt* v. *Baird*, 405 U. S. 438, 453 (1972); *Roe* v. *Wade*, 410 U. S., at 153.

In a variety of circumstances we have recognized that a necessary corollary of giving individuals freedom to choose

how to conduct their lives is acceptance of the fact that different individuals will make different choices. For example, in holding that the clearly important state interest in public education should give way to a competing claim by the Amish to the effect that extended formal schooling threatened their way of life, the Court declared: "There can be no assumption that today's majority is 'right' and the Amish and others like them are 'wrong.' A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different." *Wisconsin* v. *Yoder*, 406 U. S. 205, 223–224 (1972). The Court claims that its decision today merely refuses to recognize a fundamental right to engage in homosexual sodomy; what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others.

B

The behavior for which Hardwick faces prosecution occurred in his own home, a place to which the Fourth Amendment attaches special significance. The Court's treatment of this aspect of the case is symptomatic of its overall refusal to consider the broad principles that have informed our treatment of privacy in specific cases. Just as the right to privacy is more than the mere aggregation of a number of entitlements to engage in specific behavior, so too, protecting the physical integrity of the home is more than merely a means of protecting specific activities that often take place there. Even when our understanding of the contours of the right to privacy depends on "reference to a 'place,'" *Katz* v. *United States*, 389 U. S., at 361 (Harlan, J., concurring), "the essence of a Fourth Amendment violation is 'not the breaking of [a person's] doors, and the rummaging of his drawers,' but rather is 'the invasion of his indefeasible right of personal security, personal liberty and private property.'" *California* v. *Ciraolo*, 476 U. S. 207, 226 (1986) (POWELL, J., dis-

senting), quoting *Boyd* v. *United States*, 116 U. S. 616, 630 (1886).

The Court's interpretation of the pivotal case of *Stanley* v. *Georgia*, 394 U. S. 557 (1969), is entirely unconvincing. *Stanley* held that Georgia's undoubted power to punish the public distribution of constitutionally unprotected, obscene material did not permit the State to punish the private possession of such material. According to the majority here, *Stanley* relied entirely on the First Amendment, and thus, it is claimed, sheds no light on cases not involving printed materials. *Ante*, at 195. But that is not what *Stanley* said. Rather, the *Stanley* Court anchored its holding in the Fourth Amendment's special protection for the individual in his home:

> "'The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.'
>
> . . . . .
>
> "These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home." 394 U. S., at 564–565, quoting *Olmstead* v. *United States*, 277 U. S., at 478 (Brandeis, J., dissenting).

The central place that *Stanley* gives Justice Brandeis' dissent in *Olmstead*, a case raising *no* First Amendment claim, shows that *Stanley* rested as much on the Court's understanding of the Fourth Amendment as it did on the First. Indeed, in *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49 (1973), the Court suggested that reliance on the Fourth

Amendment not only supported the Court's outcome in *Stanley* but actually was *necessary* to it: "If obscene material unprotected by the First Amendment in itself carried with it a 'penumbra' of constitutionally protected privacy, this Court would not have found it necessary to decide *Stanley* on the narrow basis of the 'privacy of the home,' which was hardly more than a reaffirmation that 'a man's home is his castle.'" 413 U. S., at 66. "The right of the people to be secure in their . . . houses," expressly guaranteed by the Fourth Amendment, is perhaps the most "textual" of the various constitutional provisions that inform our understanding of the right to privacy, and thus I cannot agree with the Court's statement that "[t]he right pressed upon us here has no . . . support in the text of the Constitution," *ante*, at 195. Indeed, the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the heart of the Constitution's protection of privacy.

III

The Court's failure to comprehend the magnitude of the liberty interests at stake in this case leads it to slight the question whether petitioner, on behalf of the State, has justified Georgia's infringement on these interests. I believe that neither of the two general justifications for § 16–6–2 that petitioner has advanced warrants dismissing respondent's challenge for failure to state a claim.

First, petitioner asserts that the acts made criminal by the statute may have serious adverse consequences for "the general public health and welfare," such as spreading communicable diseases or fostering other criminal activity. Brief for Petitioner 37. Inasmuch as this case was dismissed by the District Court on the pleadings, it is not surprising that the record before us is barren of any evidence to support petitioner's claim.[3] In light of the state of the record, I see

[3] Even if a court faced with a challenge to § 16–6–2 were to apply simple rational-basis scrutiny to the statute, Georgia would be required to show

no justification for the Court's attempt to equate the private, consensual sexual activity at issue here with the "possession in the home of drugs, firearms, or stolen goods," *ante*, at 195, to which *Stanley* refused to extend its protection. 394 U. S., at 568, n. 11. None of the behavior so mentioned in *Stanley* can properly be viewed as "[v]ictimless," *ante*, at 195: drugs and weapons are inherently dangerous, see, *e. g.*, *McLaughlin* v. *United States*, 476 U. S. 16 (1986), and for property to be "stolen," someone must have been wrongfully deprived of it. Nothing in the record before the Court provides any justification for finding the activity forbidden by § 16–6–2 to be physically dangerous, either to the persons engaged in it or to others.[4]

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an actual connection between the forbidden acts and the ill effects it seeks to prevent. The connection between the acts prohibited by § 16–6–2 and the harms identified by petitioner in his brief before this Court is a subject of hot dispute, hardly amenable to dismissal under Federal Rule of Civil Procedure 12(b)(6). Compare, *e. g.*, Brief for Petitioner 36–37 and Brief for David Robinson, Jr., as *Amicus Curiae* 23–28, on the one hand, with *People* v. *Onofre*, 51 N. Y. 2d 476, 489, 415 N. E. 2d 936, 941 (1980); Brief for the Attorney General of the State of New York, joined by the Attorney General of the State of California, as *Amici Curiae* 11–14; and Brief for the American Psychological Association and American Public Health Association as *Amici Curiae* 19–27, on the other.

[4] Although I do not think it necessary to decide today issues that are not even remotely before us, it does seem to me that a court could find simple, analytically sound distinctions between certain private, consensual sexual conduct, on the one hand, and adultery and incest (the only two vaguely specific "sexual crimes" to which the majority points, *ante*, at 196), on the other. For example, marriage, in addition to its spiritual aspects, is a civil contract that entitles the contracting parties to a variety of governmentally provided benefits. A State might define the contractual commitment necessary to become eligible for these benefits to include a commitment of fidelity and then punish individuals for breaching that contract. Moreover, a State might conclude that adultery is likely to injure third persons, in particular, spouses and children of persons who engage in extramarital affairs. With respect to incest, a court might well agree with respondent that the nature of familial relationships renders true consent to incestuous activity sufficiently problematical that a blanket prohibition of such activity

The core of petitioner's defense of § 16–6–2, however, is that respondent and others who engage in the conduct prohibited by § 16–6–2 interfere with Georgia's exercise of the "'right of the Nation and of the States to maintain a decent society,'" *Paris Adult Theatre I* v. *Slaton*, 413 U. S., at 59–60, quoting *Jacobellis* v. *Ohio*, 378 U. S. 184, 199 (1964) (Warren, C. J., dissenting). Essentially, petitioner argues, and the Court agrees, that the fact that the acts described in § 16–6–2 "for hundreds of years, if not thousands, have been uniformly condemned as immoral" is a sufficient reason to permit a State to ban them today. Brief for Petitioner 19; see *ante*, at 190, 192–194, 196.

I cannot agree that either the length of time a majority has held its convictions or the passions with which it defends them can withdraw legislation from this Court's scrutiny. See, *e. g.*, *Roe* v. *Wade*, 410 U. S. 113 (1973); *Loving* v. *Virginia*, 388 U. S. 1 (1967); *Brown* v. *Board of Education*, 347 U. S. 483 (1954).[5] As Justice Jackson wrote so eloquently

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is warranted. See Tr. of Oral Arg. 21–22. Notably, the Court makes no effort to explain why it has chosen to group private, consensual homosexual activity with adultery and incest rather than with private, consensual heterosexual activity by unmarried persons or, indeed, with oral or anal sex within marriage.

[5] The parallel between *Loving* and this case is almost uncanny. There, too, the State relied on a religious justification for its law. Compare 388 U. S., at 3 (quoting trial court's statement that "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix"), with Brief for Petitioner 20–21 (relying on the Old and New Testaments and the writings of St. Thomas Aquinas to show that "traditional Judeo-Christian values proscribe such conduct"). There, too, defenders of the challenged statute relied heavily on the fact that when the Fourteenth Amendment was ratified, most of the States had similar prohibitions. Compare Brief for Appellee in *Loving* v. *Virginia*, O. T. 1966, No. 395, pp. 28–29, with *ante*, at 192–194, and n. 6. There, too, at the time the case came before the Court, many of the States still had criminal statutes concerning the conduct at issue. Compare 388 U. S., at 6, n. 5 (noting that 16 States still outlawed interracial marriage), with *ante*, at 193–194 (noting that 24 States and the District of Columbia have sodomy

for the Court in *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 641–642 (1943), "we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. . . . [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." See also Karst, 89 Yale L. J., at 627. It is precisely because the issue raised by this case touches the heart of what makes individuals what they are that we should be especially sensitive to the rights of those whose choices upset the majority.

The assertion that "traditional Judeo-Christian values proscribe" the conduct involved, Brief for Petitioner 20, cannot provide an adequate justification for § 16–6–2. That certain, but by no means all, religious groups condemn the behavior at issue gives the State no license to impose their judgments on the entire citizenry. The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine. See, *e. g.*, *McGowan* v. *Maryland*, 366 U. S. 420, 429–453 (1961); *Stone* v. *Graham*, 449 U. S. 39 (1980). Thus, far from buttressing his case, petitioner's invocation of Leviticus, Romans, St. Thomas Aquinas, and sodomy's heretical status during the Middle Ages undermines his suggestion that § 16–6–2 represents a legitimate use of secular coercive power.[6] A State can no more punish private behavior be-

statutes). Yet the Court held, not only that the invidious racism of Virginia's law violated the Equal Protection Clause, see 388 U. S., at 7–12, but also that the law deprived the Lovings of due process by denying them the "freedom of choice to marry" that had "long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Id.*, at 12.

[6]The theological nature of the origin of Anglo-American antisodomy statutes is patent. It was not until 1533 that sodomy was made a secular offense in England. 25 Hen. VIII, ch. 6. Until that time, the offense

cause of religious intolerance than it can punish such behavior because of racial animus. "The Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore* v. *Sidoti*, 466 U. S. 429, 433 (1984). No matter how uncomfortable a certain group may make the majority of this Court, we have held that "[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty." *O'Connor* v. *Donaldson*, 422 U. S. 563, 575 (1975). See also *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432 (1985); *United States Dept. of Agriculture* v. *Moreno*, 413 U. S. 528, 534 (1973).

Nor can § 16–6–2 be justified as a "morally neutral" exercise of Georgia's power to "protect the public environment," *Paris Adult Theatre I*, 413 U. S., at 68–69. Certainly, some private behavior can affect the fabric of society as a whole. Reasonable people may differ about whether particular sexual acts are moral or immoral, but "we have ample evidence for believing that people will not abandon morality, will not think any better of murder, cruelty and dishonesty, merely because some private sexual practice which they abominate is not punished by the law." H. L. A. Hart, Immorality and Treason, reprinted in The Law as Literature 220, 225 (L. Blom-Cooper ed. 1961). Petitioner and the Court fail to see the difference between laws that protect public sensibilities and those that enforce private morality. Statutes banning

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was, in Sir James Stephen's words, "merely ecclesiastical." 2 J. Stephen, A History of the Criminal Law of England 429–430 (1883). Pollock and Maitland similarly observed that "[t]he crime against nature . . . was so closely connected with heresy that the vulgar had but one name for both." 2 F. Pollock & F. Maitland, The History of English Law 554 (1895). The transfer of jurisdiction over prosecutions for sodomy to the secular courts seems primarily due to the alteration of ecclesiastical jurisdiction attendant on England's break with the Roman Catholic Church, rather than to any new understanding of the sovereign's interest in preventing or punishing the behavior involved. Cf. 6 E. Coke, Institutes, ch. 10 (4th ed. 1797).

public sexual activity are entirely consistent with protecting the individual's liberty interest in decisions concerning sexual relations: the same recognition that those decisions are intensely private which justifies protecting them from governmental interference can justify protecting individuals from unwilling exposure to the sexual activities of others. But the mere fact that intimate behavior may be punished when it takes place in public cannot dictate how States can regulate intimate behavior that occurs in intimate places. See *Paris Adult Theatre I*, 413 U. S., at 66, n. 13 ("marital intercourse on a street corner or a theater stage" can be forbidden despite the constitutional protection identified in *Griswold* v. *Connecticut*, 381 U. S. 479 (1965)).[7]

This case involves no real interference with the rights of others, for the mere knowledge that other individuals do not adhere to one's value system cannot be a legally cognizable interest, cf. *Diamond* v. *Charles*, 476 U. S. 54, 65–66 (1986), let alone an interest that can justify invading the houses, hearts, and minds of citizens who choose to live their lives differently.

IV

It took but three years for the Court to see the error in its analysis in *Minersville School District* v. *Gobitis*, 310 U. S.

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[7] At oral argument a suggestion appeared that, while the Fourth Amendment's special protection of the home might prevent the State from enforcing § 16–6–2 against individuals who engage in consensual sexual activity there, that protection would not make the statute invalid. See Tr. of Oral Arg. 10–11. The suggestion misses the point entirely. If the law is not invalid, then the police *can* invade the home to enforce it, provided, of course, that they obtain a determination of probable cause from a neutral magistrate. One of the reasons for the Court's holding in *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), was precisely the possibility, and repugnancy, of permitting searches to obtain evidence regarding the use of contraceptives. *Id.*, at 485–486. Permitting the kinds of searches that might be necessary to obtain evidence of the sexual activity banned by § 16–6–2 seems no less intrusive, or repugnant. Cf. *Winston* v. *Lee*, 470 U. S. 753 (1985); *Mary Beth G.* v. *City of Chicago*, 723 F. 2d 1263, 1274 (CA7 1983).

586 (1940), and to recognize that the threat to national cohesion posed by a refusal to salute the flag was vastly outweighed by the threat to those same values posed by compelling such a salute. See *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624 (1943). I can only hope that here, too, the Court soon will reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do. Because I think the Court today betrays those values, I dissent.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

Like the statute that is challenged in this case,[1] the rationale of the Court's opinion applies equally to the prohibited conduct regardless of whether the parties who engage in it are married or unmarried, or are of the same or different sexes.[2] Sodomy was condemned as an odious and sinful type of behavior during the formative period of the common law.[3]

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[1] See Ga. Code Ann. § 16–6–2(a) (1984) ("A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another").

[2] The Court states that the "issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time." *Ante*, at 190. In reality, however, it is the indiscriminate prohibition of sodomy, heterosexual as well as homosexual, that has been present "for a very long time." See nn. 3, 4, and 5, *infra*. Moreover, the reasoning the Court employs would provide the same support for the statute as it is written as it does for the statute as it is narrowly construed by the Court.

[3] See, *e. g.*, 1 W. Hawkins, Pleas of the Crown 9 (6th ed. 1787) ("All unnatural carnal copulations, whether with man or beast, seem to come under the notion of sodomy, which was felony by the antient common law, and punished, according to some authors, with burning; according to others, . . . with burying alive"); 4 W. Blackstone, Commentaries *215

That condemnation was equally damning for heterosexual and homosexual sodomy.[4] Moreover, it provided no special exemption for married couples.[5] The license to cohabit and to produce legitimate offspring simply did not include any permission to engage in sexual conduct that was considered a "crime against nature."

The history of the Georgia statute before us clearly reveals this traditional prohibition of heterosexual, as well as homosexual, sodomy.[6] Indeed, at one point in the 20th century, Georgia's law was construed to permit certain sexual conduct between homosexual women even though such conduct was prohibited between heterosexuals.[7] The history of the statutes cited by the majority as proof for the proposition that sodomy is not constitutionally protected, *ante*, at 192–194,

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(discussing "the infamous *crime against nature*, committed either with man or beast; a crime which ought to be strictly and impartially proved, and then as strictly and impartially punished").

[4] See 1 E. East, Pleas of the Crown 480 (1803) ("This offence, concerning which the least notice is the best, consists in a carnal knowledge committed against the order of nature by man with man, or in the same unnatural manner with woman, or by man or woman in any manner with beast"); J. Hawley & M. McGregor, The Criminal Law 287 (3d ed. 1899) ("Sodomy is the carnal knowledge against the order of nature by two persons with each other, or of a human being with a beast. . . . The offense may be committed between a man and a woman, or between two male persons, or between a man or a woman and a beast").

[5] See J. May, The Law of Crimes § 203 (2d ed. 1893) ("Sodomy, otherwise called buggery, bestiality, and the crime against nature, is the unnatural copulation of two persons with each other, or of a human being with a beast. . . . It may be committed by a man with a man, by a man with a beast, or by a woman with a beast, or by a man with a woman—his wife, in which case, if she consent, she is an accomplice").

[6] The predecessor of the current Georgia statute provided: "Sodomy is the carnal knowledge and connection against the order of nature, by man with man, or in the same unnatural manner with woman." Ga. Code, Tit. 1, Pt. 4, § 4251 (1861). This prohibition of heterosexual sodomy was not purely hortatory. See, *e. g.*, *Comer* v. *State*, 21 Ga. App. 306, 94 S. E. 314 (1917) (affirming prosecution for consensual heterosexual sodomy).

[7] See *Thompson* v. *Aldredge*, 187 Ga. 467, 200 S. E. 799 (1939).

and nn. 5 and 6, similarly reveals a prohibition on heterosexual, as well as homosexual, sodomy.[8]

Because the Georgia statute expresses the traditional view that sodomy is an immoral kind of conduct regardless of the identity of the persons who engage in it, I believe that a proper analysis of its constitutionality requires consideration of two questions: First, may a State totally prohibit the described conduct by means of a neutral law applying without exception to all persons subject to its jurisdiction? If not, may the State save the statute by announcing that it will only enforce the law against homosexuals? The two questions merit separate discussion.

I

Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.[9] Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment. *Griswold* v. *Connecticut*, 381 U. S. 479 (1965). Moreover, this protection extends to intimate choices by unmarried as well as married persons. *Carey* v. *Population Services International*, 431 U. S. 678 (1977); *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972).

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[8] A review of the statutes cited by the majority discloses that, in 1791, in 1868, and today, the vast majority of sodomy statutes do not differentiate between homosexual and heterosexual sodomy.

[9] See *Loving* v. *Virginia*, 388 U. S. 1 (1967). Interestingly, miscegenation was once treated as a crime similar to sodomy. See Hawley & McGregor, The Criminal Law, at 287 (discussing crime of sodomy); *id.*, at 288 (discussing crime of miscegenation).

In consideration of claims of this kind, the Court has emphasized the individual interest in privacy, but its decisions have actually been animated by an even more fundamental concern. As I wrote some years ago:

> "These cases do not deal with the individual's interest in protection from unwarranted public attention, comment, or exploitation. They deal, rather, with the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny. The Court has referred to such decisions as implicating 'basic values,' as being 'fundamental,' and as being dignified by history and tradition. The character of the Court's language in these cases brings to mind the origins of the American heritage of freedom—the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable. Guided by history, our tradition of respect for the dignity of individual choice in matters of conscience and the restraints implicit in the federal system, federal judges have accepted the responsibility for recognition and protection of these rights in appropriate cases." *Fitzgerald* v. *Porter Memorial Hospital*, 523 F. 2d 716, 719–720 (CA7 1975) (footnotes omitted), cert. denied, 425 U. S. 916 (1976).

Society has every right to encourage its individual members to follow particular traditions in expressing affection for one another and in gratifying their personal desires. It, of course, may prohibit an individual from imposing his will on another to satisfy his own selfish interests. It also may prevent an individual from interfering with, or violating, a legally sanctioned and protected relationship, such as marriage. And it may explain the relative advantages and disadvantages of different forms of intimate expression. But when individual married couples are isolated from observation by others, the way in which they voluntarily choose to conduct their intimate relations is a matter for them—not the

State—to decide.[10] The essential "liberty" that animated the development of the law in cases like *Griswold*, *Eisenstadt*, and *Carey* surely embraces the right to engage in nonreproductive, sexual conduct that others may consider offensive or immoral.

Paradoxical as it may seem, our prior cases thus establish that a State may not prohibit sodomy within "the sacred precincts of marital bedrooms," *Griswold*, 381 U. S., at 485, or, indeed, between unmarried heterosexual adults. *Eisenstadt*, 405 U. S., at 453. In all events, it is perfectly clear that the State of Georgia may not totally prohibit the conduct proscribed by § 16–6–2 of the Georgia Criminal Code.

II

If the Georgia statute cannot be enforced as it is written—if the conduct it seeks to prohibit is a protected form of liberty for the vast majority of Georgia's citizens—the State must assume the burden of justifying a selective application of its law. Either the persons to whom Georgia seeks to apply its statute do not have the same interest in "liberty" that others have, or there must be a reason why the State may be permitted to apply a generally applicable law to certain persons that it does not apply to others.

The first possibility is plainly unacceptable. Although the meaning of the principle that "all men are created equal" is not always clear, it surely must mean that every free citizen has the same interest in "liberty" that the members of the majority share. From the standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary

[10] Indeed, the Georgia Attorney General concedes that Georgia's statute would be unconstitutional if applied to a married couple. See Tr. of Oral Arg. 8 (stating that application of the statute to a married couple "would be unconstitutional" because of the "right of marital privacy as identified by the Court in Griswold"). Significantly, Georgia passed the current statute three years after the Court's decision in *Griswold*.

associations with his companions. State intrusion into the private conduct of either is equally burdensome.

The second possibility is similarly unacceptable. A policy of selective application must be supported by a neutral and legitimate interest—something more substantial than a habitual dislike for, or ignorance about, the disfavored group. Neither the State nor the Court has identified any such interest in this case. The Court has posited as a justification for the Georgia statute "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable." *Ante*, at 196. But the Georgia electorate has expressed no such belief—instead, its representatives enacted a law that presumably reflects the belief that *all sodomy* is immoral and unacceptable. Unless the Court is prepared to conclude that such a law is constitutional, it may not rely on the work product of the Georgia Legislature to support its holding. For the Georgia statute does not single out homosexuals as a separate class meriting special disfavored treatment.

Nor, indeed, does the Georgia prosecutor even believe that all homosexuals who violate this statute should be punished. This conclusion is evident from the fact that the respondent in this very case has formally acknowledged in his complaint and in court that he has engaged, and intends to continue to engage, in the prohibited conduct, yet the State has elected not to process criminal charges against him. As JUSTICE POWELL points out, moreover, Georgia's prohibition on private, consensual sodomy has not been enforced for decades.[11] The record of nonenforcement, in this case and in the last several decades, belies the Attorney General's representa-

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[11] *Ante*, at 198, n. 2 (POWELL, J., concurring). See also Tr. of Oral Arg. 4–5 (argument of Georgia Attorney General) (noting, in response to question about prosecution "where the activity took place in a private residence," the "last case I can recall was back in the 1930's or 40's").

tions about the importance of the State's selective application of its generally applicable law.[12]

Both the Georgia statute and the Georgia prosecutor thus completely fail to provide the Court with any support for the conclusion that homosexual sodomy, *simpliciter*, is considered unacceptable conduct in that State, and that the burden of justifying a selective application of the generally applicable law has been met.

III

The Court orders the dismissal of respondent's complaint even though the State's statute prohibits all sodomy; even though that prohibition is concededly unconstitutional with respect to heterosexuals; and even though the State's *post hoc* explanations for selective application are belied by the State's own actions. At the very least, I think it clear at this early stage of the litigation that respondent has alleged a constitutional claim sufficient to withstand a motion to dismiss.[13]

I respectfully dissent.

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[12] It is, of course, possible to argue that a statute has a purely symbolic role. Cf. *Carey* v. *Population Services International*, 431 U. S. 678, 715, n. 3 (1977) (STEVENS, J., concurring in part and concurring in judgment) ("The fact that the State admittedly has never brought a prosecution under the statute . . . is consistent with appellants' position that the purpose of the statute is merely symbolic"). Since the Georgia Attorney General does not even defend the statute as written, however, see n. 10, *supra*, the State cannot possibly rest on the notion that the statute may be defended for its symbolic message.

[13] Indeed, at this stage, it appears that the statute indiscriminately authorizes a policy of selective prosecution that is neither limited to the class of homosexual persons nor embraces all persons in that class, but rather applies to those who may be arbitrarily selected by the prosecutor for reasons that are not revealed either in the record of this case or in the text of the statute. If that is true, although the text of the statute is clear enough, its true meaning may be "so intolerably vague that evenhanded enforcement of the law is a virtual impossibility." *Marks* v. *United States*, 430 U. S. 188, 198 (1977) (STEVENS, J., concurring in part and dissenting in part).